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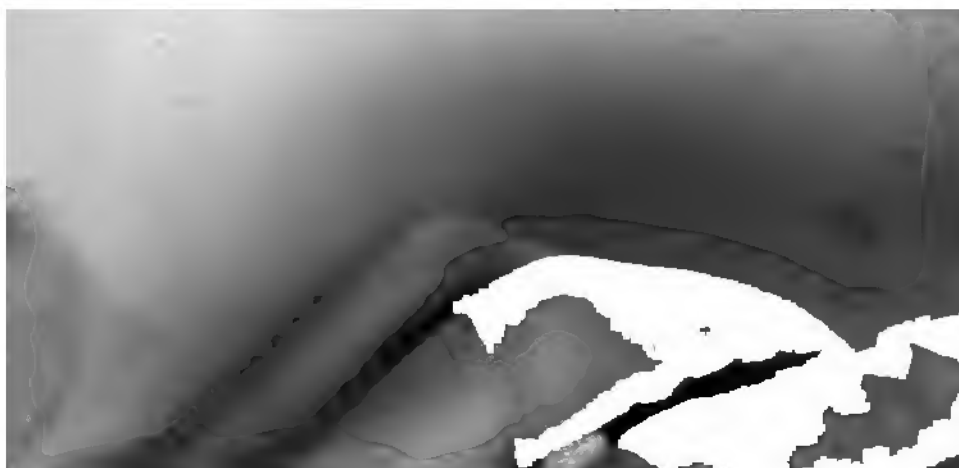
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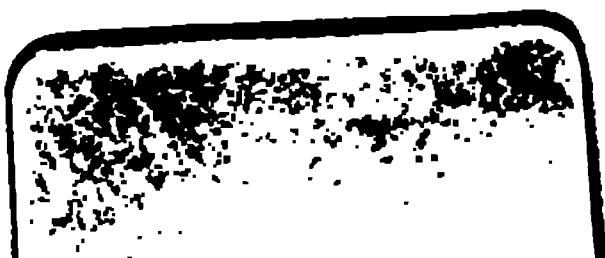
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1828.
R E P O R T S

OF

CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

FROM THE YEAR 1789 to 1817.

29 to 57 GEO. III.

By FRANCIS VESEY, JUNIOR, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

VOLUME I.

COMMENCING IN THE SITTINGS AFTER HILARY TERM, 29 GEO. III.

ENDING IN THE SITTINGS AFTER TRINITY TERM, 32 GEO. III.

THE SECOND EDITION.

Omne jus, quod est certum, aut scripto, aut moribus constat. Dubium æquilatis regulâ examinandum est. Quæ scripta sunt, aut posita in more civitatis, nullam habent difficultatem: cognitionis sunt enim, non inventionis. At quæ consultorum responsis explicantur, aut in verborum interpretatione sunt posita, aut in recti præviq̃ue discrimine.

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PREFACE

TO

THE SECOND EDITION.

IT is not necessary to state circumstances, beyond the Editor's control, which have delayed another Edition of this Work. The inconvenience, that has resulted from the delay, may in some degree be compensated by the effect, that this Edition is not hastily brought out without the opportunity of preparation; but has grown up gradually under an attentive observation of what has been passing in Westminster Hall, with ample time for careful revision and examination of the Authorities. , In availing myself of that opportunity I am not conscious of negligence; and I cannot without injustice and ingratitude omit this occasion to acknowledge the liberal assistance of my Friend Mr. BEAMES; the value of whose assistance, previously well established, may be farther estimated by his able Exposition of the Practice of the Court of Chancery, its defects, and proposed amendments, in the *Explanatory Paper*, annexed to the Report under the Chancery Commission, of which he was a Member.

PREFACE TO THE SECOND EDITION.

THE general plan of this Edition is to give the greatest scope of information in the most convenient and compendious form, by Notes; studiously avoiding the repetition of long lists of cases; and by the selection of such as contain collections of Authorities supplying a chain of reference, that may secure to the Student the means of tracing his subject to its source; and to the practising Lawyer that important object, the economy of time. The occasional expression of my own opinion, perhaps of some use in suggesting or promoting inquiry, never assuming the disguise of authority is at least harmless.

IN reviewing these Volumes I find with satisfaction the occasion for correction to arise chiefly from the great alteration of the Law, by Statute as well as decision, since they were first submitted to the Profession; and that this Work, commenced at an early age, and prosecuted under difficulties peculiar to its nature, has sustained during more than thirty years the unremitted attention and pointed scrutiny of a learned and critical Tribunal, unassailed by censure, with a single exception; where it appears to be comprehended under the following general stricture upon Modern Reports in a Pamphlet, that has recently excited considerable notice:—

“ REDUNDANCY is the vice of the age; and
“ it appears in every thing. Perhaps it is no where
“ more

PREFACE TO THE SECOND EDITION.

“ more striking than in the length of Modern
“ Reports. What *Peere Williams* would have com-
“ pressed in a single page, in a Modern Report may
“ occupy half a volume. The length indeed of
“ Modern Reports is a serious evil; and a great
“ obstruction to the dispatch of business. A case
“ in *Peere Williams* may be read in five minutes;
“ and its import perfectly comprehended. It may
“ take as many hours even to read over a Modern
“ Report; and in the mass of matter it may be
“ difficult to discover the import of the whole.”*

To the Author of these remarks, profoundly versed in the principles of Equity, and familiar with the Practice of the Court of Chancery, as he appears to be, it seems almost superfluous to point out the obvious causes of wide difference between ancient and modern works of this nature; that the transactions of modern times are utterly incapable of any thing like that compression, which the more simple dealings and habits of our Ancestors admitted; that the establishment of Principles in the early period took a much less extended range than their application in more recent times through a series of Authorities, often fluctuating and discordant, to the various and complicated affairs, resulting from
the

* ‘ *Considerations suggested by the Report made to his Majesty under a Commission authorising the Commissioners to make certain inquiries respecting the Court of Chancery.*’ (P. 64, 5.)

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the great increase of wealth, an excessive spirit of commercial enterprise, and a state of society, that has attained the highest point of cultivation and refinement; that the redundancy, complained of, in the chambers of the Conveyancer, the discussions at the Bar, and by necessary consequence on the Bench, and the unworthy habit of meeting a pressing authority by a groundless insinuation of a defect in the Report, are all combined against even moderate compression; much more to an extent, calculated upon the scale of *Totill* rather than *Peere Williams*; who, with Lord *Coke* and all the best Reporters, has many cases of length in proportion to the variety, weight and importance, of the subject. Any competent and candid Judge will admit, that this Work could have been diffused to a far greater extent with much less trouble than has been applied to compress it within a compass, bearing a slight proportion to the period occupied. The Duke of *Norfolk's Case*, when the Principles, governing the law of Perpetuity, were established, will surely justify that upon the Will of Mr. *Thellusson*; when those Principles were for the first time successfully invaded by a new device, that called forth the immediate interference of the Legislature. To the necessity, acknowledged by the Justice of the Bar, of compressing and combining arguments of distinguished merit indulgence has been generally allowed: but the recommendation to abridge, at the imminent hazard of mutilating, a
Judgment;

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Judgment, the charge, that a Reporter has succeeded in giving the precise language, in which it was pronounced, and preserving unbroken the chain of close reasoning upon an abstruse subject, have the character of, at least, singular novelty. Who desires to see the learning of Lord *Hardwicke* or Lord *Eldon* reduced to a single page; to be read in five minutes; and how is that to be effected? To give, without farther allusion to living Judges, one instance, that will meet universal assent; can a sentence, falling from Sir *William Grant*, be touched, or a word dropped, without injury?

THE condescension of the Bench and the friendship of the Bar lead me to believe, that my conclusion upon this would, if erroneous, have been corrected. From the general silence I do not infer disapprobation; and, looking beyond our own *Forum* to a similar contemporary Work, the valuable Reports of Lord *Redesdale's* decisions afford ample testimony, that the noble Lord, who pronounced those learned, and therefore diffuse, Judgments, and by his countenance, advice and assistance, sanctioned those Reports, for which we are indebted to the spirit of discussion introduced and uniformly encouraged by his Lordship *, is upon this subject at variance with the Author of "*Considerations suggested by the Report*" under the *Chancery* Commission.

I HAVE

* Preface to *Schoales* and *Le Froy's* Reports.

PREFACE TO THE SECOND EDITION.

I HAVE been frequently pressed to complete this Work by the addition of a Digested Table or Index; and the necessity for such an addition, of an authentic character, is rendered more urgent by a publication, assuming that title, with attempts to give it an appearance of connection and identity with the original Work; and, as I am informed, from motives sufficiently obvious venturing upon the hazardous experiment of alteration. I take this opportunity of declaring that publication to have been undertaken, not only without authority, but without even the courtesy of a communication; and of pointing out the extreme danger and mischief of alteration. The formation of the Abstracts, of which the Tables are composed, was attended with more difficulty than any other part of this Work, in the endeavour to comprise in a single proposition the substance of a long and intricate Judgment or opinion; and, where that from a complication of circumstances was impracticable, to guard against misleading the Reader to a reliance upon the Abstract by some intimation, that the case at large, or the text, must be consulted. Under these circumstances I shall attempt to combine the double object of Index and Digest upon a plan of copious reference and clear arrangement, at once comprehensive and simple; avoiding a repetition of the same proposition, which in so large a collection may frequently recur,

and

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and that minute and excessive attention to method, which is apt to create intricacy and confusion. This design is now in progress; and shall be completed, I hope in one volume, with no more delay than may be requisite to its due execution.

F. VESEY.

September, 1827.

ORIGINAL PREFACE.

THE public discussion, which every circumstance arising in the course of the administration of justice receives in this country, forms one of the most remarkable among the political beauties of a free constitution. But this principle, however beneficial the consequences immediately resulting from it, if it is to be confined simply within the narrow limits of oral communication, if no means to preserve and perpetuate are devised, falls far short of that degree of improvement, to which it is capable of being extended. Hence the advantages attending works of this nature are so universally allowed, and the occasional want of them has been so sensibly experienced, that it is unnecessary to allege any other reason for an attempt to promote the design, than the encouragement, by which it is sanctioned. Yet, though the general purpose may require no farther observation, I am obliged to acknowledge the justice, with which a charge of presumption may be raised against me in submitting to the ordeal of publication the unpromising essays of youth and inexperience; a charge I am so little prepared to answer, that I shall rather endeavour to deprecate its effects by intreating, that a distinction may be made between those errors, which are occasioned by the difficulties peculiar to this undertaking, and such as appear to be the consequence of a culpable negligence in the execution; that
if

ORIGINAL PREFACE.

if the disadvantages, I have had to encounter, appear to have been with any degree of success counteracted by attention and diligence, I may not meet with too severe animadversion; and that particular defects may not be productive of general condemnation.

IN respect of *Reports* the Court of *Chancery* has been much neglected from the latter end of the time of Lord *Hardwicke* to the period, at which Lord *Thurlow* received the Seal; when the publication of its proceedings commenced, which is annually continued much to the benefit of the Profession and the Public. Cotemporary Reports have always received that approbation, which the advantages, derived from having two accounts of the same case by different persons, seem to deserve; by which both are illustrated; deficiencies are mutually supplied; and the whole case appears in a state more complete and perfect, than can be expected from a single note, where the work is from its nature liable to difficulties of a peculiar sort. On this account I have not judged it proper to suppress any cases, merely because they had been before reported. Those however, who entertain a different opinion upon this subject, will find, that no objection upon that ground arises in this instance; as it has happened, that this collection interferes so little with the Reports, I have mentioned, that both, though under the same title and during the same period, may be considered as distinct works operating to the same useful end.

THE plan here adopted is that, which seems to meet with the most general approbation. The facts are stated in their natural order, and in a manner as concise

ORIGINAL PREFACE.

cise as possible consistently with the necessary perspicuity ; to which brevity has always been considered as only a secondary object. The arguments of the Counsel are united, except where some particular reason operates to the contrary, for the purpose of arrangement and to avoid repetition. The judgments are stated as fully and with as strict regard to accuracy as possible ; and I have been particularly anxious by preserving the language used to give not my own construction only, but as nearly as possible the very words, in which the opinion of the Court was expressed.

LONG recitals of instruments, and every thing, which would unnecessarily burthen and perplex the case, have been studiously avoided. Where partial recitals have been found necessary, inverted commas are used without any introduction, as the neatest and most concise method.

AT the beginning of each case in the margin an abstract of the points actually before the Court, and the manner, in which they were disposed of, is given as shortly as is consistent with the nature of the case. Besides those principal abstracts, whatever collateral positions fell from the Court are also abstracted in the margin opposite to their respective situations in the text ; by which method a distinction is marked between the points actually determined and positions occurring incidentally ; which are usually termed *dicta* ; and are always considered as being of inferior authority. In the Table the same distinction is observed by inserting in the references to the matters actually in judgment the page, and also the name of the case ; but the page only in referring

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referring to the collateral points; so that the respective authority of each will immediately appear.

It is obvious, that these abstracts must sometimes run unavoidably into an awkward and inconvenient length: that inconvenience however it has been judged prudent to prefer to an incomplete and partial statement.

THE case of *The King v. Ponsonby*, in the Court of *King's Bench*, *Michaelmas* 1755, is a case of considerable importance, and was argued by characters of the highest reputation. Mr. *Henley's* argument is cited by Lord *Kenyon*, 4 *Term Reports*, 146. The only Report, I have been able to find of that branch of the case, which was before the Court of *King's Bench*, is in *Sayer*, 245*; and as it is there given without the arguments, according to the usual method of that Reporter, I thought the insertion of it in a more complete state would be acceptable.

THE case of *Ellis v. Smith* in the Court of *Chancery*, 1754, has never before been reported. From that circumstance and the solemnity of the decision, I think, the insertion of it requires no apology.

I HAVE not frequently attempted the dangerous province of comment or annotation: where I have been induced imprudently to venture in that way, the motive will, I hope, insure that indulgence, to which I look as the best security against censure.

IF

* Another Report of this case, from the notes of Lord *Kenyon*, Chief Justice, has been lately published by Mr. *Hanmer*, p. 1.

ORIGINAL PREFACE.

IF I shall be so fortunate as to find, that this attempt meets with approbation, my intention is to continue it annually in the usual manner, and to contribute, as far as is in my power, to a faithful and comprehensive publication of Proceedings in a Court, the Decisions of which are so highly interesting and important.

Lord THURLOW,

Lord High Chancellor.

Lord Chief Baron EYRE,

Mr. Justice ASHHURST,

Mr. Justice WILSON,

}

**Lords Commissioners of the Great
Seal, *June* 15th, 1792.**

SIR RICHARD PEPPER ARDEN, Master of the Rolls.

SIR ARCHIBALD MACDONALD, Attorney General.

SIR JOHN SCOTT,

Solicitor General.

A

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CASES

IN

CHANCERY, &c.

THE KING *v.* PONSONBY (1).

King's Bench, Michaelmas, 1755.

Sir DUDLEY RYDER, *Lord Chief Justice.*

DENNISON,
FOSTER, } *Justices.*
WILMOT,

1755.

ERROR from the *King's Bench* in *Ireland*, where an information in nature of a *quo warranto* was filed against nine persons; charging them with usurping the office of free-burgesses of the corporation of *Newtown*. They severed in their plea. Two, setting forth the tenor of the charter of incorporation, &c. plead, that they were elected without notice; that they never did usurp; but now claim to be admitted and sworn into office. Replication, that they did claim, though by reason of non-residence they could not exercise. Rejoinder; demurrer; joinder in demurrer. Seven plead, they were duly elected and sworn into office, *absque hoc*, that they usurped. Replication, that they lived absent from the borough, and so by non-residence had forfeited their offices. Rejoinder, that they attended at all times, but when they had lawful excuse of absence: and behaved, as they ought: and that the corporation did not by any fault of theirs suffer the least injury. Demurrer, joinder, and judgment of *ouster* against all.

Information in nature of *quo warranto* upon 9 Anne, c. 20, for usurping the office of free burgess does not lie against the mere claim of one, who, though elected, never was admitted: nor against a member, till removal by the corporation.

(1) *Sayer*, 245. 1 *Ld. Kenyon's Rep.* by Mr. Hanmer, 1.
VOL. I. A

1755.

The KING
 v.
 PONSONBY.

Mr. *Henley*, for the Plaintiffs in Error.

The question as to the seven is, Whether they have forfeited their franchise for mere non-residence, and whether to be taken advantage of by *quo warranto*. This question is new and extensive. By the charter the Crown has enabled the provost and burgesses to elect upon a vacancy: and to make amotion upon misbehaviour: not intending amotion should be by any other than the major part. The general question, then, as to the seven, may be divided into three: 1st. Whether the franchise of a burgess is forfeited by non-residence by the common law: merely being a misbehaviour at law. 2^{dly}. Whether, by any express or implied provision or condition in the charter, non-residence is a forfeiture or determination. 3^{dly}. Whether it can be taken advantage of by *quo warranto*. Where the corporation derives from the Crown power of amotion, it is inconsistent with the jurisdiction of the Court, that any misbehaviour can be judged of before amotion. The first question must depend upon the grant; whether the burghership is of a local nature, or a mere personal privilege to be enjoyed in a particular place, and no more than a freeman. The nature of a burgess in its genuine sense means a tradesman dwelling in a burgh for the sake of traffic; and not carrying any magistracy or authority: 1 *Inst.* 80. They paid a tax for trading: *Reily's Placita Parl.* 259. *Dr. Brady of Cities and Boroughs*, 16. The bishops and lords licensed burgesses to trade; and they all derived their privileges to trade either from the crown, or the person who had the franchise of granting license. When they came to be incorporated, the tax was either remitted, or turned into a fee-farm rent. *Sit liber Burgus* is the word. It was common to be a burgess of several towns; nay, of the hans-towns: *Clerac de la Hans*, 190. When incorporated they were called as well freemen as burgesses; and had a mere personal privilege: 4 *Mod.* 36. *Sho.* 365; and it was admitted on the last argument, that by common law residence is not necessary. 2^{dly}. Does the Crown by the charter require residence? It is agreed, that the Crown has not expressly required it; and it is not shewn that any duty is annexed which requires it. But it was said, the end of the incorporation on the charter implies the duty of residence on the constitution of it; for that the intent of the charter was
to

to people the North: which by not residing is not done; but I deny, that the residence would people that country. The means were the constituting it a * free borough for trade, where they might do greater benefit by absence. Another method was the privilege of being represented in parliament in Ireland. Another, the advantage of having their own courts. No man is to forfeit a freehold by intendment, implication, or construction. Though this Court has jurisdiction by appeal: yet it cannot take the jurisdiction from the provost, &c.: in whom the power of removal is placed by the charter in the first instance. By this charter misbehaviour is not a cesser or avoidance, but only a cause of remotion; for he is expressly to continue during life, or *donec amovebitur*; otherwise, what confusion would ensue! For by the secret misbehaviour of one, a corporation may be dissolved, if it is cesser. In all charters, therefore, the Crown has made misbehaviour a cause of avoidance only; and so have the Courts considered it. In *The King v. Slade*, 1 Geo. 1, in the borough of *Truro*, the Chief Justice held, an information might go: but the other three Judges held, not; and that non-residence was only a species of misbehaviour; and that till amotion they cannot proceed to elect. The Court cannot in any suit take notice of misbehaviour before removal: for on the return of a mandamus, if a misbehaviour appears, and no amotion, a peremptory mandamus goes. This is illustrated by 3 *Salk.* 239, and is the known law: for the place is not *ipso facto* void by the misbehaviour, till actual removal: which is the only cause of vacancy. So *Carth.* 229. This information is on an Irish statute, in the same words as the 9th *Anne*; and the Court must give judgment according to the statute. By this statute the Court has an authority against people, who unlawfully intrude or hold. The case is stated to be only a *clamat habere*. In this Court no information is granted, but on affidavit, that the person actually exercises the office. This is the constant practice. I moved against a person in this Court, claiming to have an office of town-clerk of *Grampound*; the affidavit not shewing that he acted; the information was denied upon the general principle. As to the seven, who have been elected and admitted, but not removed, this information will not lie. As to the two, who never were admitted, it is absurd, that a judgment of ouster should be against them, who never were

1755.

The KING
v.

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[* 3]

1755.
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 The KING  
 v.  
 PONSONBY.  
 [ \* 4 ]

in. There is a plain distinction between writs of *quo warranto* and informations of *quo warranto* : for a writ of *quo warranto* was never brought for an office; they were for royal franchises and privileges, consisting of such as were derived \* from the Crown by particular subjects ; as waifs and estrays ; which, if not existing in the claimant, did in the Crown : but were not perpetually existing, only casual ; and the claim was a right of claiming, when the casualty happened. The exercise of an office is the usurpation, which cannot be exercised till possession. This is a new jurisdiction in this Court, given by parliament ; and must be strictly pursued : nor can any judgment be given, but consistently with the acts 9th of *Anne*, and 19th of *Geo. 2*, *viz.* nothing but judgment of *ouster*. This therefore differs from the case of writs, where the judgment is a forejudger of his claim, if he claims a privilege without entry.

*Sir Richard Lloyd*, for Defendants.

Whether a claim on record to have a right to act is proper for an information, that is, is a final offence, has not been determined. As to the seven acting burgesses, who have been elected and admitted, but have never been at the borough since ; that absence is some cause of forfeiture, as a departure from an office, is a good cause of removal, I have always looked on as settled. The borough is the place, where the office is to be exercised ; and deserting the borough is deserting the office. The desertion is admitted on the rejoinder ; 1st Question, Is non-residence for a considerable time a cause of forfeiture of an office in all cases ? Next, How is it to be taken advantage of ? Where residence is expressly or impliedly required, non-residence is a forfeiture ; otherwise it would be a contradiction ; for if the condition of living there is annexed to the office, he cannot be entitled to it without living there. So, in the case of an alderman, escheator, coroner, &c. the end of the office not being complied with, it is void. The reason of the distinction between offices of trust and government, and offices not so, is because some are necessary for the government of the place ; in such case non-residence makes the office void. In *Bagg's Case*, 11 *Coke*, any thing against the duty of a citizen or burgess, or good of the city or borough, is an offence, for which his office is forfeitable : and therefore there  
 is

is an implied condition annexed to every franchise for the benefit of the corporation. But whether it is an office of trust and government, or no, makes no difference; for if the condition of residence is annexed, whether for trust or trade, non-residence, being a breach, avoids and forfeits the office. The \*intent of the charter is to annex such a condition. 1st. The creation is of a new borough; therefore they must abide by the terms of the charter. 2dly. It recites, that the North is depopulated; and in order to people *Newtown*, and at the request of the inhabitants, is the charter granted. 3dly. The twelve burgesses are to elect a provost; which shews an intention of their residence for that purpose. 4thly. All the officers are to be chosen out of the inhabitants: therefore the view of the charter is to make the town more populous by residence; and the King intended to give the office of burgess only to the inhabitants. 2d Question, Supposing the office void, whether this is the proper remedy? The Crown must have a right to see its own creature do its duty; unless the Crown has delegated the power. So in the case of royal visitations. But the King may retain part, or the whole; so much as he does not dispose of, he retains. So, he may give a power of removal for a particular purpose, not for others. Where by the charter power is given for removing for misbehaviour, the corporation may remove summarily; but where not, it is triable by a jury. But unless the Crown has parted with all its power, it remains. In this case it is not a misbehaviour in his office, but for not acting in his office; and the charter only extends to misbehaviour in his office: and if a man holds a franchise against the terms of the franchise, an information in nature of a *quo warranto* will lie. The charter says only, he shall be removed; but does not say, by the corporation; therefore a power of removal remains with the Crown. I do not say, the Crown can give away a power, and keep a concurrent power; but there rests with the Crown all, it does not expressly part with. As to the two burgesses who never were admitted; I agree the Court never grants informations, but where the person acts in the office, or is sworn in; but we cannot say, what appears on the affidavits in *Ireland*. The true ground, on which the Court grants informations, is the Defendant's acceptance of the office. Being sworn in is no more than an acceptance,

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ceptance. Here the defendant says he is admitted, and insists on his right to the office, which is an acceptance. There can be no judgment, *eat sine die* would not be the judgment; for the record admits, he had no right to the office. An error in the judgment against the two cannot affect the judgment against the seven. It is in the discretion of the Court to suffer all to be joined in one information.

[ 6 ]

Whether non-user is cause of forfeiture of a public office depends on circumstances.

RYDER, *Ch. Just.* delivered the opinion of the Court:

The first question is, Whether the non-residence stated here as with the rejoinder is a cause of forfeiture? Whether non-user is a cause of forfeiture of a public office, in general depends on the nature of the office, the time of non-user, and several circumstances; but it is not necessary upon this occasion to go into that precisely. The second question is, Whether an information in the nature of a *quo warranto* is the suitable and proper remedy in this case? It clearly is, which makes the other questions unnecessary. By the ancient manner of trying the right of franchises, the King might either bring a writ of *quo warranto*, whereby the mere right might be tried: which writ is now almost out of use; or might consider the person usurping as an offender; and file an information: whereby he would be punished by fine, &c. In the reign of Charles II. when corporations and their privileges became much the subject of attention, informations were very frequent; and in many cases the judgment of ouster was pronounced; the legality of which was much doubted, till 9th *Anne*, which orders, that judgment of ouster shall be pronounced against all, who shall usurp, intrude into, or unlawfully hold or execute the offices or franchises there mentioned: which is *verbatim* enacted in *Ireland*: and upon it plainly is the present information brought. 1st. Whether it lies against the two-non-acting burgesses? It clearly cannot: upon this ground, that under the words of the statute there must be usurpation, intrusion, or unlawful holding.—Now claiming, which only appears against them, can by no construction be taken to amount to any of these; and it would be strange to imagine the statute intended ever to prevent the asserting or claiming a right. The practice now generally is to have an affidavit of some act of usurpation, upon

upon application to the Court for leave to file, &c. As to the objection, that the corporation would suffer for want of officers: how can that be? For surely by the words of the charter, upon the elapsing of the time for swearing those elected, they may chuse new ones. *2dly.* Whether it lies against the other seven? It clearly does not; for unless non-residence be *ipso facto* a forfeiture of the office, there can be no pretence, that it should; and we are of opinion, that non-residence is not an immediate forfeiture, for reasons, that set this matter in a very plain light; *1st.* the office of free burgess is a freehold; and cannot cease without \*some act of ceremony; nay, every member of a corporation may be deemed in some degree seised of every thing the corporation has of an inheritable nature; so that it would be highly inconsistent with the rules of law, that such interest should determine in such a manner: and contrary to the meaning and sense of *Magna Charta*, which says, "*Nullus liber homo disseisetur de libero tenemento, vel libertatibus suis, nisi per judicium parium, vel legem terræ;*" but still more inconsistent with the tenor of the charter, that has expressly provided for such cases, by granting to the corporation a power of amotion, which in the present case ought to have been exercised; and then if the Defendants had persisted in the use of their offices, they would have been guilty of usurpation, and liable to an information of this kind. But there is still another reason, why non-residence cannot be taken as a forfeiture in itself, that indeed puts an end to all question on the point; *viz.* that it would be impossible to ascertain, when the forfeiture happened; and to imagine that it was, as it were, inchoate the second day after the person became seised of the office, to be afterwards ripened by time, is absurd, and helps not in any degree the uncertainty; for when shall we say it was consummate? This being laid down, that non-residence is not a forfeiture in itself, but maybe a cause of one only; till amotion there could be no usurpation, &c.; which never having happened, these Defendants must be deemed seised to this day as formerly. Had the corporation used their power of amotion; and the Defendants notwithstanding retained their offices; then being in by no legal title, they might come within the words of the statute: and be the proper objects of the present information; which only lies against such persons, as usurp, intrude into, unlawfully hold, or execute; none of which can be said of these Defendants; who,

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Non-residence  
not an immediate forfei-  
ture.

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[ \* 8. ]

Non-user is a  
 misdemeanor  
 punishable by  
 a common in-  
 formation.

King may, at  
 his discretion,  
 seize the fran-

chise of a corporation guilty of an offence amounting to a forfeiture.


who, though they are guilty of a cause of forfeiture, continue still seised legally of their offices, till such cause of forfeiture is ascertained, and punished by amotion, the remedy prescribed by the charter: and of this the person, who drew the replication, seems to have been aware; setting forth, that by non-residence they did forfeit their offices; and so endeavours to bring them within the words of the statute. It savours of a contradiction in terms, that an information, that was intended by the legislature as a remedy against the unlawful exercise of offices, should be brought upon the ground of non-exercise; \*which is the mischievous consequence of non-residence; and the reason for imagining it a cause of forfeiture. Non-user of an office, as it is a misdemeanor, and an offence against justice, may be punished, like all other offences, by a common information adapted properly to the case. But the present one is quite of another nature, and improper for the reasons already mentioned, As to the objection, that if there was not a remedy by the present information, there would be a failure of justice, that is not to be presumed; for the King has provided, and expressly granted in the charter, a remedy and the means adequate, by a power of amotion in the corporation. As to the objection, that though there is such a remedy in the hands of the corporation, yet that cannot take away the jurisdiction incident to the Crown over such matters; that seems to arise from a mistake, that there is such jurisdiction in the Crown. Now the Court is of opinion, That the Crown has no jurisdiction of this kind, to be exercised immediately by itself; nor can it disfranchise a member of a corporation duly elected; when it has appointed such power to be exercised by the corporation itself. This was laid down by Lord *Holt*, who declared, the King could not remove but in the formal way by his subordinate officers, meaning the corporation themselves, who were the best judges of the nature of their own constitution; and what were such offences, as should be punished as forfeitures by amotion: and at this day it is held, that corporations have such power of amotion incident to their constitution, in opposition to *Bagg's Case*, 11 Co.; where a corporation itself is guilty of an offence amounting to a forfeiture, the King may seize the franchise into his hands: but that is a power confined to and discretionary in the King himself.

himself. As to the question, that since the majority in the present case are delinquents, there must be a failure of justice, as the power never will be exercised, which enables the corporation to amove in such cases : 1st. It does not appear, the majority are delinquents ; for as the Defendants have all severed in their pleas, the confession of one cannot be used as evidence against another ; for, was that admitted, it would be in the power of any Defendant by collusion with the Plaintiff to do much injury and wrong to any person, with whom he might be joined in the action for that very purpose of confessing the charge against the other. It would be most unreasonable, that one man should be bound by the defence of another. But if it should be the case, and upon complaint made the corporation or majority of them should refuse to act, it is not clear, whether there is any remedy. Perhaps a mandatory writ would lie to compel them to execute their power. But then that would avail little ; for it would still be in their discretion to judge, what are the proper grounds for amotion. As to the objection, that they may act corruptly ; it can be answered, that if so, and there is sufficient evidence of it, they may be punished, as offenders usually are in such cases ; or if they are guilty of a gross misdemeanor, or what may be a ground for it, the King may seize the franchise into his hands ; but that is not the act of the Court, but of the King himself, in whom it is quite discretionary. Upon the whole, if there is a defect of remedy in this case, it is but like those cases, where acts of parliament have been necessary, as was 9th *Anne*, which extends not to the present case. The defect of remedy arises from a defect in the act, and not of any construction on it.

The judgment must be reversed.

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This reversal was affirmed by the Lords, 5 *Bro. P. C.* 287.

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One man not  
 bound by the  
 defence of an-  
 other.

[ \* 9 ]



# CASES IN CHANCERY.

ELLIS *v.* SMITH (2).

LORD HARDWICKE, *Chancellor.*

SIR JOHN STRANGE, *Master of the Rolls.*

WILLES, *Chief Justice.*

PARKER, *Chief Baron.*

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PARKER, *Chief Baron.*

11th May.

THE questions in this case arise on the 5th and 6th sections in the statute of Frauds. The first is, Whether testator's declaration before three witnesses, that it is his will, is equivalent to signing it before them; and constitutes a good will within the 5th section; and, *2dly.* Whether such will is a revocation according to the 6th.

The formalities requisite to a will are, *1st.* That it be in writing. *2dly.* That it be signed by the party devising, or some other in his presence and by his direction. *3dly.* That it be attested and subscribed in his presence by three or more witnesses.

I confess, if this had been *res integra*, I should doubt, whether the testator's declaration is a proper execution within the 5th clause; because, I think, an admission, that it is sufficient, tends to weaken the force of the statute; and let in inconveniences and perjuries, which the statute designed to prevent; but I find myself bound by such a number of former precedents, that I must give way to their superior weight. The case of *Lemayne v. Stanley*, 3 *Lev.* 1, must, I think, have come before the Court on this very question now before us; for I can see no other; it being allowed in that case on all hands that signing in any part of the will was sufficient. In *Skinn.* 227, Lord \**Jefferies* declared, he thought the testator's acknowledgment sufficient. *Com.* 197. Lord *Trevor* of the same opinion:

Will subscribed by three Witnesses, before whom testator declared it to be his will, but did not sign it; such declaration is equivalent to signing it before them, and such will is good within the 5th section of the statute of frauds, and is also a good will of revocation within the 6th.

and

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and in *Dormer v. Thurland*, 2 *P. Will.* 510, Lord *King* inclined to think a will of land good, if the testator acknowledged the name to be his, and the witnesses subscribed in his presence. The case of *Lee v. Libb*, *Carth.* 35, has been insisted on; and brought to bear down the authorities I have now mentioned. But what was that case? There was only one witness to the will, and two to the codicil; neither therefore had three witnesses; *ergo*, not good. Indeed Lord *Holt* there said, he thought, the witnesses should attest the signing; but that was an *obiter dictum*. To strengthen the authorities I have already mentioned, I shall take notice of the cases, which allow the witnesses to subscribe at different times; and I think, they support the admission of the declaration in question; since the testator is not supposed to run over his name before every witness; but having signed before one, to acknowledge it only before the rest.

In *Cook v. Parsons*, *Prec. Ch.* 184, the Lord *Keeper* held a publication of a will before three witnesses, though at three several times, good within the statute; and in *Jones v. Lake*, the Court decreed, that the witnesses may subscribe at different times. As to the point, whether sealing be signing, as has been contended; I own, I think, it is not; for the character and hand-writing(3) are necessary; and were designed to prevent or detect frauds and impositions. But however as in some cases it is thrown out *obiter*, and in one case decreed, that it is equal to signing, I shall submit my opinion.

As to the second question, Whether such will is a revocation within the 6th section of the statute; I think, it is; and that a revocation may be by any will executed according to the 5th section: for the words "*signed in the presence of three witnesses*," &c. relate only to the preceding words, "*any other writing*." The clause is to be construed in the disjunctive; *viz.* either by will, codicil, &c.: or, by writing signed before three witnesses. In 3 *Lev.* 86, held no revocation, because neither will nor codicil; but had it been either, it would have been otherwise: Upon the whole therefore, I think, this is a good will, and a good revocation.

(3) See the case of witnesses, who were marksmen, post, *Harrison v. Harrison*. *Addy v. Grix*, Vol. VIII, 185. 504. XVII, 459.

WILLES, *Chief Justice*.

I shall begin, as my Lord *Chief Baron* did, by declaring, that if this was a new point, I would desire more time; for I am not satisfied in my own mind, that the testator's acknowledgment is sufficient: but authorities bear me down; and I must yield; as more evil might flow from resisting than giving way to them. I shall invert the order of the questions made by the *Chief Baron*; for I think, it is necessary first to shew, that this will is a revocation; otherwise it is nothing; therefore my first question will be, whether the words of the 6th section, which require signing before three witnesses, relate to wills of revocation; and in my opinion they do not; but refer merely to the words, "*other writing*," which is the *proximum antecedens*; and it seems ridiculous to say, wills of revocation should be executed in one way, and wills of devising in another. Mr. *Clarke* drew an argument from the mention of wills in other parts of the statute; but I am of opinion, that wills, when mentioned in other parts of the statute, mean only wills of personal estate.

As to the other question, whether this will is executed according to the fifth clause; I must first mention, what has been maintained, that sealing is signing. In the present case only one witness swears, the testator put his finger on the seal; but that testifies not *animum signandi*. There is no evidence, that he sealed before three witnesses. Nor do I think, sealing is to be considered as signing; and I declare so now, because, if that question ever comes before me, I shall not think myself precluded from weighing it thoroughly and decreeing, that it is not signing, notwithstanding the *obiter dicta*, which in many cases were *nunquam dicta*; but barely the words of the reporters; for upon examination I have found many of the sayings ascribed to that great man, Lord Chief Justice *Holt*, were never said by him. I come now to the point, whether testator's acknowledging his hand can be deemed sufficient; and from the many authorities, some in point, some not in point, I think it must be admitted sufficient; and a contrary decree would admit much uncertainty and confusion. The case of *Lee v. Libb*, and others cited, and ingeniously supported by Mr. *Yorke*, are not however sufficient to overthrow the weight of others,
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and to make us decree the declaration in question insufficient. The authorities not directly in point support more strongly my decree, than even those in point; for they allow the attestation and subscription of the witnesses at different times to be good. The testator then is presumed to write his name only before one, and to acknowledge it to be his hand to the remaining two; and why should not his acknowledgment to the three be equally good? If he writes his name three different times, it is executing his will three times; and no one of these executions is before three witnesses. I think, the cases admitting the attestation at three different times have gone too far; much farther than the present case goes; for as I have known one man swear, that he did not see the testator sign, and the other two swear, that he signed it before the three; so might one man swear, that when he attested the will, the testator was of insane mind, another that he was sane, &c. and an inlet is made for great frauds and impositions. But when they attest it *simul et semel*, they are a check on each other, and prevent such frauds. Nay, I think a parol disposition before three full as solemn an act, as a will in writing attested by three *separatim*; but such attestation has been allowed good: and upon what has been so often decided, I must decree this to be a good will and a good revocation.

Sir JOHN STRANGE, *Master of the Rolls*.

These questions have been so clearly stated and strongly supported by the Lord *Ch. J.* and *Ch. Bar.* that I shall take up little of the time of the Court in giving my opinion. The case of witnesses attesting at different times has so many authorities, that it may be considered as settled; yet I think it a dangerous determination, and destructive of those barriers the statute erected against perjury and frauds; and I see much worse consequences attending that and the other opinion contended for, that sealing is signing, than I do from the decision of the present questions; for in the present case there was much though perhaps not all the solemnity, that should have been. The first point is, whether this would be a good and sufficient will, if there had been no preceding will; and here I should hesitate, if the case had not often before been decided; but authorities bind me. The case of *Lemayne v. Stanley* was  
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soon after the statute; and I apprehend, this very question was then before the Court; for had the witnesses seen the testator write his name at the top or in any other part of the will, there could not have been a question concerning the execution, it being \*admitted on all hands that writing his name in any part ( 4 ) is signing. Therefore, I apprehend, the question then was the same, that is now before the Court; and the determination then directs my opinion now. In 3 *P. Wms.* 254, Sir *Joseph Jekyl* held without doubt an acknowledgment sufficient, and in *Dormer v. Thurland*, Lord *King* was of the same opinion; but that case is not so strong as the preceding, as there was no absolute determination of that question. To the authorities in the books I shall add some later cases, which come strongly recommended to me by the opinion and knowledge I have of the great abilities of the noble Lord presiding in this Court, before whom they were decided. In *Grayson v. Atkinson* ( 5 ) the question now before us was decided; and in *Smith v. Caudron*, two saw the testator sign his will, and subscribe it; then a third was called in, to whom the testator declared it to be his; and held sufficient. To permit the witnesses to attest at several times is to admit, that the asseveration of the testator, that it is his will, shall be equivalent to signing it before the witnesses; and to determine otherwise at this time would introduce confusion and uncertainty, and sap the foundation of much property, which rests on former decrees. Indeed, that sealing is signing, I am not convinced; for sealing identifies nothing; it carries no character ( 6 ); and most seals are affixed by the stationers, who prepare the paper. In the present case there is no evidence even of sealing before three witnesses. The second question is founded on the 6th section of the statute; and as to that it seems to be absurd to say, that a will shall be effectual to pass lands, yet another executed in the very same manner shall not revoke it; that certain formalities

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(4) The name must be inserted in such a manner, as to have the effect of giving authenticity to the whole instrument: *Stokes v. Moore*, 1 *P. W.* 771, Mr. *Cox's* note. *Morrison v. Turnour*, post, Vol. XVIII, 175.

(5) 2 *Ves.* 454.

(6) See the case of witnesses, who were marksmen, post, *Harrison v. Harrison*, *Addy v. Grix*, Vol. VIII, 185. 504. XVII, 459.

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formalities shall strip the heir at law, and yet the like formalities shall not have force to restore him to his inheritance. The statute in the beginning of the 6th section makes a will or codicil a revocation; and adds at the end, "*or any other writing signed in the presence of three witnesses.*" Now I do not think these last words are to be drawn back to the first; but that they refer merely to any other writing or loose paper; for a will is in itself a revocation, if inconsistent with a former, though there is no express revocation. I am therefore of opinion, that this is a good will, and a good revocation.

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Lord HARDWICKE, C.

The solemnity of the present decision arises not from the difficulty of the questions, but from collateral accidents. This is the case of a will made in *America*, disposing of lands both in *America* and *England*; and, the original being detained abroad, there could be no trial of the will at law, for the original ought to be submitted to the Jury, and the Court; it was therefore agreed by the parties, that a case should be made of the same nature with that now before us for the opinion of the Court of King's Bench. The case sent to the Court consisted merely of recitals of depositions taken in the cause; and the Court refused to receive it; (I think rightly) requiring a case made upon facts agreed. The sickness of the then Chief Justice being soon followed by his death, I made the present case; and desired the assistance of the learned Judges now present, with whom I have the pleasure to agree in opinion.

The construction of the execution of a will the same in equity as at law.

When I have premised, that there is no difference between the construction of the execution of a will in this Court and the Courts of Common Law, I shall make one or two observations on the questions in the present case. The first question is, whether, if this had been a first will, it would have been good and effectual within the 5th section of the statute. I agree with all the learned persons, who spoke before me, that if it had been *res integra*, I should doubt; but it is now *res indicata*; and *stare decisis* seems wisest. As to the authorities allowed by all to be in point, I should say nothing concerning them; but cases have been mentioned to support the former, which are said not to be directly in point. These I mention for the sake of this one observation, that I think them strongly  
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in point: that they support the present case from their direct similitude, not from any consequential reasoning: for I apprehend that the determination in all these cases was grounded on this, that a declaration by the testator was good: for, if he signed three times, there were three executions, and none could be good within the statute. I consider them therefore as authorities, that come up to the very question: and they are stronger, as they are admitted by the Counsel on both sides; and no attempt has been made to shake them. That they go too far, and open a way to frauds, I will not deny; and the Court should not go farther; but this is not going so far; \*since the former cases admitted a declaration before one witness; in the present case his acknowledgment is before three. The second question is, whether this will is a good revocation within the 6th clause. I think it is. The words "*signed in the presence of three witnesses,*" refer to the words "*other writing*" of revocation; and not to a will or codicil, which must be a revocation, when inconsistent with the preceding. Whenever will and codicil is mentioned in the other parts of the statute, they mean will and codicil at large as before the statute, and not as now, when restrained by the statute. The two clauses only relate to wills of land; and when the 6th clause takes up will and codicil, it takes them up, as it found them, such as they are prescribed in the 5th clause, without requiring any thing more. It is true, a second will devising lands to an heir at law, is void; because the better title prevails: but then the instrument is a good instrument, if executed according to the statute. It has been hinted, as if this determination would lead the way to farther deviations from the statute; and by consequence allow testator's declaration, that another signed for him, to be good: but authority given by a testator is a collateral thing, and a thing that ought to be proved: consequence is not to be built on consequence in cases of this nature. I think, that where things are expressly required by statute, Courts are not to say, other things shall not be equivalent to them; but I also think, authorities established are so many laws; and receding from them unsettles property; and uncertainty is the unavoidable consequence. To the maxim of Lord Bacon, cited at the bar, that, not the decision, but the ground, on which it stands, is to be regarded, I shall

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Witnesses may attest separately; in that case, if testator acknowledges before each, or signs before one, [ \* 17 ] and acknowledges before the rest, it is good; bad, if he signs it before each, because three different executions, and no one good within the statute.

Will to an heir at law void, but, if executed according to the statute of frauds, it is a good revocation of a former will.



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oppose the saying of Lord *Trevor*, a man most liberal in his constructions, that many uniform decisions ought to have weight, that the law may be known: and, to gratify private opinion, established opinions are not to be receded from (7).

(7) *Addy v. Grix*, post, Vol. VIII, 504. *Westbeeck v. Kennedy*, 1 *Ves. & Bea.* 362.

It seems difficult to reconcile the determination upon the principal point in this case, that the declaration of the testator, that the instrument is his will, is a sufficient execution, with the opinion, attributed to the Lord *Chancellor* and *Chief Justice*, that, if in a case of separate attestations he actually signs it each time, it is bad, as there are separate executions, and no one good within the statute. The statute having required that the will shall be signed by the testator, the admission of the validity of his declaration, that it is his will, or of an acknowledgment by him of his handwriting, can be good only as being equivalent to signing; and it is hard to say, that such declaration or acknowledgment can be sufficient in any case, where actual signing would not do; that the validity of one act can be supported upon the sole *ground of being equivalent to another, which is invalid. If the acknowledgment is allowed to be equivalent to actual signing, the converse of that proposition must be at least equally true. The difficulty in these cases arises from the different

penning of the 5th and 6th sections. The 5th, respecting wills of land, directs, that they shall be in writing, and signed by the deviser, without saying in the presence of witnesses, but goes on by directing, that they shall be attested and subscribed by three witnesses in his presence; the 6th respects revocations, which it directs must be by some other will or codicil, or other writing signed by the deviser in the presence of three witnesses. It may reasonably be doubted, as it was in this case, whether this difference of expression was not casual, and whether the legislature did not mean the same thing by both phrases, viz. that the execution both of wills and revocations should take place in the presence of three witnesses; otherwise they did little more, than if they had required but one witness; and it is justly observed by Chief Justice *Willes* in this case, that a parol disposition before three is full as solemn an act, as a will in writing attested by three separately. This conjecture seems to be supported by those clauses of the statute, which respect nuncupative wills; the making of which is required to be in the presence of three witnesses. Perhaps this instance will be turned the other way, by

by saying, that in that case greater strictness was intended; but it may be answered, that land was the primary, personal property the secondary, object only, of the legislature's attention; with this view they abolished nuncupative wills of the former, but only restrained them as to the latter. The restrictions adopted are calculated to ascertain with sufficient certainty, where the value of the property made it worth while, that the words were intended to be testamentary, and spoken under the expectation of death, and to prevent the consequences of fraud and mistake, to which verbal dispositions are peculiarly liable, and therefore seem more to respect the substance of such wills, than to require peculiar strictness in their attestation. But supposing greater strictness intended in this case, it is not likely, that the legislature would have executed that intention by requiring the same number of witnesses to nuncupative wills and to wills of land, but by annihilating with respect to the latter (the chief object of their care) almost all the advantages, which give to the united attestation of many authenticity superior to that of one. Would they not rather have increased with the civil law the number of witnesses, where they intended greater strictness of execution? But a decisive answer is given by the 22d section, by which

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verbal dispositions of personal estate, where there is a written will, and verbal revocations of written wills of personal estate, must be committed to writing in the life of the testator, read to and allowed by him, and *proved to be so done* by three witnesses; the words directing the mode of attestation here are more loose than in any of the other cases, yet certainly the legislature intended to keep a still stricter hand over this case; and with that view have imposed additional restrictions, which must have the effect of a prohibition of the thing; as, if the injunctions of the statute are observed, the will or revocation ceases to be nuncupative: if not, it is void. However, as former cases had determined upon this difference of expression between the 5th and 6th sections, that a will might be attested at different times, the modern cases have wisely reconciled those decisions with the statute, by holding, that the words in the 6th section, "signed in the presence of three witnesses," only relate to the immediate preceding words, "other writing," and that the legislature intended more strictness in the execution of an instrument of revocation, which is neither a will nor a codicil, than of either of those. Perhaps the difficulty pointed out above, as occurring in this case, may be obviated by considering, that the opinion dropped, that if

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the testator actually signed before each witness separately, there would be three executions, and no one good within the statute, was extra-judicial; and if the point had been before the Court, and fully considered, it would probably have received a different decision; for, as the statute requires signing by the * testator; as it is determined, that his acknowledgment is equivalent to signing; and that the attestation may be at different times; and as each witness can attest only what passes in his presence, it follows, that in every case of separate attestations there must be as many distinct separate acts of execution by the testator, either by signing, or by

what is equivalent to it; besides it may be said, that when once it is settled, that the witnesses may attest at different times, it must be allowed to continue open for that purpose during the whole life of devisor, and there can be no one complete execution according to the statute, till the third witness has signed, though the devisor should in the mean time sign it fifty times; and this reasoning is supported by what Lord *Hardwicke* said, 2 *Ves.* 458, that *signing* in presence of the witnesses may be at different times, and *ibid.* 459, that it is allowed, that *signing toties quoties* is sufficient, and by *Lodge v. Jennings, Gilb. Rep.* 255. See also 170, 171.

LEWIS v. PEAD.

1789.

Feb. 26th.

BULLER, J. for the LORD CHANCELLOR.

Old age alone not a sufficient ground to presume imposition.

MRS. LEWIS, when near 75 years of age, made a lease to the defendant, *Jones*, for 99 years, reserving a rent of 70*l.* a year, in consideration of 100*l.* She died soon after, leaving by will the bulk of her property to the defendant, *Pead*, and 400*l.* a year to her son; who filed a bill against *Jones, Pead*, and the two *Humphries's*, as agents in the transaction, to have the lease delivered up for want of consideration, and upon the ground of fraud. According to the evidence for the Plaintiff, *Pead* was at first a labourer in her service, and afterwards became her bailiff and manager: and *Jones* three years afterwards acknowledged, that this lease was worth 800*l.*; though there had been no improvement.

The Defendants denied all fraud; and insisted, that *Pead* had not been a labourer.

There was another bill by the son to have the will of Mrs. *Lewis* set aside, and to compel *Pead* to give up some deeds, under which the Plaintiff claimed. The answer denied having the deeds. The right had been determined in ejectment; but it was tried after the bill filed.

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v.
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Mr. *Mansfield* and Mr. *Lloyd*, for Plaintiff.

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The lease was worth at least 130*l.* per annum; being absolutely for 99 years, it was worth 1000*l.* or 1300*l.* and there is no pretence for any consideration except 100*l.* Defendants well knew the age of Mrs. *Lewis*, and the value of the estate; upon all which circumstances there is sufficient ground to presume fraud.

BULLER, J.

There must be some substantial ground for supposing fraud, stated and proved. Her being old is no proof, that she was imposed upon. She did not choose to acquaint even her own attorney with her reasons for granting this lease. There is no sort of fraud in the original concoction of the business; and therefore there is no use in following it up to find out some collusion between the two *Humphries's*. There is not any evidence of its being a fraudulent transaction. We have seen the greatest abilities displayed at a greater age than 75; therefore, that alone can be no ground to presume imposition. That bill therefore must be dismissed with costs to all the Defendants; Costs given. for she had a right to make this contract; and though the reasons of her favour to this man do not appear, that does not signify; and it appears she lived on bad terms with her son, the Plaintiff. But he was not wrong in filing the other bill; because he had a right to come into Equity to have the matter inquired into, when his mother gave so much of her property to a servant in preference to her son. But as it appears, that the Plaintiff possessed under this will a property from his mother of 400*l.* a year, the bill must be dismissed; but without Costs refused. costs; as costs have been given in the other cause; and as he was not wrong in filing this bill; having done that before the trial in ejectment, which determined the right, took place.

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LAMPERT v. LAMPERT.

Feb. 26th.

BULLER, J. for the LORD CHANCELLOR.

Agreement on marriage to settle stock and other property of the wife to the use of the wife; husband, having by fraud made her transfer the stock to him, decreed upon a bill for performance to transfer the stock and assign the rest under the direction of the Master to trustees for her use, who should receive the dividends due, and to become due, till the transfer and assignment. Costs on account of the fraud.

BILL by a wife against her husband to compel execution of an agreement, entered into upon their marriage, by a transfer of stock, and assignment of other property, to which Plaintiff was entitled under that settlement, to trustees for her use. It was proved by a clerk of the Bank, that the Plaintiff being brought by the Defendant to the Bank, started at hearing the word "*transfer*;" and said, she came to receive a dividend; and complained of the duplicity of her husband.

Mr. *Mansfield* and Mr. *Ainge*, for Plaintiff.

This is the third time Plaintiff has been obliged to come into this Court. She had filed a bill before, which she dismissed upon the husband's promise to execute the agreement, which after the dismissal of the bill he refused to perform. By his deceit at the Bank she was made to transfer this money, which had never been transferred before, into his name. Upon her dismissing the bill a new agreement took place, which the husband ratified, but afterwards refused to perform.

Mr. *Mitford*, for Defendant.

The wife's friends have ruined the husband by obtaining his dismissal from the office of collector of excise. He has made every offer to them, that he may be enabled to maintain her, if she will not put her property entirely out of his power. The object of the agreement before marriage was to give her the sole disposal of that money, which was her own before; therefore she had a right to make the transfer to him, and it is to be presumed, she did it voluntarily. The answer positively denies fraud; if there had been any thing of that nature, they ought to have examined the broker employed.

BULLER, J.

The only question is about this deed. As to her having been imposed upon, it is clear. I must look into the whole of their conduct; from which the imposition is plain. He must transfer the stock, and pay the costs on account of the fraud, what-

whatsoever may be the consequence, for the sake of the example; and it must be referred to the Master to prepare a proper assignment of all the other property. Until the transfer shall be made, the dividends now due, and to become due, must be paid to trustees for her own use. The affair at the Bank, as appears from the evidence of the clerk, was one entire transaction; upon the whole of which I am to judge; and from which it is plain, she was imposed on; therefore she must have costs (8).

(8) Upon equitable jurisdiction between husband and wife, see 1 *Fonb. Tr. Eq.* 94. *Legard v. Johnson*, post, Vol. III, 352.

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COUNTESS OF STRATHMORE v. BOWES (9).

1789.

March 2d.

LADY STRATHMORE being seised and possessed of great property, both real and personal, pending a treaty of marriage with Mr. Grey, conveyed all her real, and assigned all her personal to trustees for her sole and separate use, notwithstanding any future coverture. This settlement was prepared with the approbation of Grey. A few days after the execution, hearing that Mr. Bowes had fought a duel on her account with the editor of a newspaper, who had traduced her character, she determined to marry him, and the marriage took place the next day. Bowes had no notice of the settlement. There were two bills; an original bill by Lady Strathmore to set aside a deed revoking the settlement as having been obtained by duress; and a cross bill by Mr. Bowes to set aside the settlement as against the rights of marriage, and a fraud upon him, and to establish the deed of revocation. An issue (10) was directed to try, whether the deed of revocation had been obtained by duress; and the verdict in the Common Pleas was against the deed. The cause coming on upon the Equity reserved, Mr. J. Buller, sitting for the Lord Chancellor, decreed in favour of Lady Strathmore; and dismissed the cross bill with costs. It came on again upon the petition

A woman pending a treaty of marriage with A. settled all her property to her separate use with his approbation; a few days after B. by a stratagem induced her to marry him the day after she first thought of it; B. had no notice of the settlement. The settlement was established; and a deed of revocation, obtained by duress, set aside.

(9) The first hearing of the re-hearing, 2 *Cox*, 28.
cause reported, 2 *Bro. C. C.* 345. (10) *Peel v. ———*, post,
On the Equity reserved and the Vol. XVI, 157.

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petition of Mr. *Bowes* for a re-hearing; and reversal of that decree so far as it dismissed the cross bill.

Mr. *Richards*, for Mr. *Bowes*.

The question is, whether this settlement made before marriage is valid, or not; as being in derogation of the common * rights of marriage. A wife by the marriage contract becomes extinct from the nature of it for several civil purposes; with regard to which she merges in the husband. He becomes liable to all her debts, and answerable for all her acts, that do not amount to felony; and even for that, if committed in his presence; because her mind is supposed to be under his coercion. In order to enable him to answer this he has by the law all her property. It is absurd to say, the wife shall by her own act deprive the husband of what the law has given him. It was not decided till lately, that a legacy to a wife for her sole and separate use would have been good without the interposition of trustees; and this case is much stronger, because to be construed more strictly than a devise; nor can the interposition of trustees make any difference, because it cannot alter the nature of the thing. As to his not having made any settlement on her, many marriages are made without any; and in this case it could not be necessary; for she had 10,000*l.* or 12,000*l.* a year; a great estate for life, and much personal property. There is another principle very material: marriage by the law of *England* gives the husband the whole dominion over the property, and also over the person of his wife, except as to murder; for by the old law he could not be punished for cruelty towards her. The civil existence of the wife merged in that of the husband: he is the head of the family: to make another would be against the policy of the law. If the wife can by her own act against the consent of the husband make herself independent of him, it will destroy that subordination so necessary in families; which is analogous to that in the state, and tends to support it; for if Lady *Strathmore* is right in this, the husband is become a cipher in his own house; for he cannot educate his children, or do any other act which by law he has a right to do. The deed was executed on the 10th or 11th of *January*, and the marriage took place upon the 17th. If the deed had been meant fairly in contemplation of marriage,

riage, the husband would have been a party to it; there is no instance to the contrary; and it is necessary in order to testify the consent of the husband. In *Howard v. Hooker*, 2 Ch. Ca. 81, a settlement by the wife before marriage without notice to the husband was set aside. In *Lance v. Norman*, 2 Ch. Rep. 59, a bargain entered into by the wife before marriage was set aside, because the husband was not a party; and this case is stronger; because there the wife was only made poorer; but here she is made quite independent of the husband. In *Carleton v. Dorset*, 2 Vern. 17, the estate was made over before marriage to trustees without privity of the husband; and a conveyance was decreed to the six-clerk, and the personal property to be paid into Court for the husband, because in derogation of the rights of marriage; and in *Edmonds v. Dellington*, cited in the foregoing case, a deed of settlement made before marriage without notice to the husband was set aside. In *Poulson v. Wellington*, 2 P. Will. 535, Lord King said, that if a woman before marriage settled her property without giving notice to the intended husband, it would as to him be fraudulent and void. *Cotton v. King*, 2 P. Will. 358. 674. Lady Cotton, widow, had ten children by her first husband; and before the second marriage by indenture settled part of her fortune in their favour; (reserving, however, a considerable portion) without notice to the husband: King filed a bill to have this deed delivered up to him: but as the transaction of making the deed had been public; as she had so many children by her first husband, for whom it was reasonable to provide, before she entered into a second marriage; and as her second husband was a person in mean circumstances, and had received a good fortune with her; and as she had reserved something to herself; King's bill was for these reasons dismissed. This decision shews, that if it had not been for the benefit of the children by the first marriage, and on account of these several circumstances, it would have been good. Upon these cases, and the principle of the thing, this settlement is void, as being in derogation of common right. It is to be observed, that in all these cases something was reserved; here there is nothing; for Lady Strathmore has conveyed all her real, and assigned all her personal, property to trustees for her own use: and the circumstance of appointing trustees will not alter the nature of the thing, though it drives us into a Court of Equity.

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Countess of
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For Lady *Strathmore*; Mr. *Mansfield*, Mr. *Hardinge*,
Mr. *Law*, and Mr. *King*.

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Lady *Strathmore* is in possession by a deed to trustees, giving her own property to her use. It was done in contemplation of marriage with another person; therefore not fraudulent, as to Mr. *Bowes*; unless any deed by a *fême sole*, by which she disposes of her property, shall be construed to be fraudulent, if not communicated to any future husband. Want of communication * is the only circumstance, that can be alleged; but that is very different from concealment, for which there can be no pretence here. It is true, a man by marrying a woman gains a dominion over her property, and in a great degree over her person; though perhaps not in the extent contended; but he had nothing to do with this property, for it was not in her at the time of the marriage; having been previously vested in trustees; and as every man knows, that a woman may settle her property so, that a future husband shall not be able to touch it, Mr. *Bowes* ought to have inquired about it before hand. There is no pretence of actual imposition upon him, nor even upon *Grey*. The deed was prepared by a gentleman of the first credit; she had several children by Lord *Strathmore*; she was going to marry Mr. *Grey*; and made this previous settlement for her children; and she acted meritoriously and honorably in so doing. The deed was with *Grey's* knowledge, and under his direction: his approbation of it appeared by his having called to know, when it would be ready; and to hasten it; and it was prepared, though not executed, a month before the time of the marriage; therefore not fraudulent as to Mr. *Grey*; and there is no authority for vacating a settlement made by a woman for the protection of her children, without fraud. Mr. *Bowes* made no settlement on Lady *Strathmore*; neither did *King* upon Lady *Cotton* in the case cited; (which was one of the grounds of the decision in that case) though *Bowes* had some fortune by a former wife. He took Lady *Strathmore*, as she then was, with what she then had; therefore there is nothing fraudulent, or that can entitle him to relief in this Court. Knowing that she was a woman subject to sudden and violent impulses of generosity, he made use of a vile artifice to obtain her by means of a sham duel (for it is in every stage of the cause admitted to have been so) with the proprietor

prietor of a newspaper, who had traduced her; and the emotion and precipitation, which he caused by this artifice, was the cause, which prevented the communication of the actual situation of her fortune. After this Mr. *Bowes* made use of the most reproachful means to set aside this deed; and the verdict was, that the revocation was obtained by violence. He would not have done this, had he not thought the deed a good one. The reason of the case is, (nor is there a *dictum* to the contrary) that where a woman about to marry represents herself as possessed of a fortune, which she had previously disposed of, this Court will not permit the *husband to be cheated. *Howard v. Hooker*, to which all the cases refer, was of that kind, being a specific fraud upon the husband. The marriage had been broke off, and was brought on again by the interposition of friends, upon the idea of the husband, that he was to enjoy the wife's fortune, in consideration of which he made a settlement on her of 500*l.* a year. In *Lance v. Norman*, the wife before marriage entered into a recognizance concealed from the intended husband; and the object of it was to enable the creditor who was her own brother, to distress the husband; and they had made an attempt to defraud him before by getting him to sign a deed, which was in *Latin*, that he might not understand it, telling him it was only a memorandum. In *Carleton v. Dorset*, the wife conveyed all her fortune to trustees to her own use, with permission to herself to appoint; and in default of appointment, to her own right heirs; and afterwards married: here the case was, that the husband had assurance, that he was to enjoy the estate of his wife; and the decree was upon the ground, that it was a trust for her with power to appoint; and as she made no appointment, it was resolved to be a trust for her husband. Besides, in that case the fortune was paid into Court; and a reasonable allowance was to be made to her. It has been remarked, that the foundation of the decree in *King v. Cotton* was, that it was to provide for children, which has been said to be the only case, in which this can be good; but the settlement on children or any one else will not make any difference; the question is, what right the husband has: if he has any right, notwithstanding any voluntary disposition without notice to him, because he was deceived, the manner, in which that deceit was practised, will make no difference with respect to

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to him ; for the ground for relief must be, that he was cheated, because the settlement was not communicated to him. *King v. Cotton* is for Lady *Strathmore* ; for Lady *Cotton* had disposed of her fortune, so as to put it quite out of the power of her husband ; and yet the settlement was established. As to *Edmonds v. Dellington*, Mr. *J. Buller* suspected, that it was misreported in *Vernon* ; where it is only a loose note cited at the bar ; and on inspecting the register the decrec turns out to be quite different from that report ; for the deed was established upon the ground of distinct notice to the husband ; and in that case, as in this, the settlement was of all her property. These cases therefore only go on the ground of fraud on the husband, of * which there is no suggestion here. But this is not a question upon a deed executed by a future wife pending a treaty of marriage with a future husband ; nor upon a deed made in prejudice generally of marital rights ; nor of a settlement by a husband, by which he pays for his future power over the fortune of his wife. Suppose a husband to say, he is indifferent as to the fortune of his wife, in order to appear disinterested ; suppose, having a fortune, he makes no settlement ; and suppose the marriage instantaneous, no time being given for communication or concealment ; it is enough for the husband to say his secret hope was disappointed ? The only pretence here is, that he expected her fortune would have been greater, than it proved, which expectation he did not disclose. To make this deed valid is only to put a safe-guard in her hands against the consequences of an improvident marriage ; and she had a right while *sui juris* to baffle for so much, what would otherwise have been the marital power of her husband. It is enough for us to say, Mr. *Bowes* was not cheated.

Lord CHANCELLOR.

The mere question seems to be, what is the true foundation for setting aside an instrument *prima facie* good. Can less be imputed to it than fraud ? Or can it be void upon the notion of general policy, as has been urged for Mr. *Bowes* ? If not, must not fraud be imputed ? And if so, will the circumstances of its being made in contemplation of marriage affect it with fraud ? Suppose a relation had given 10,000*l.* for her sole and separate use ; if she had represented it as her own absolutely, so that
upon

upon a marriage it would have gone to her husband, this Court would have compelled the trustees to give it to the husband; but not otherwise; nor is there any difference between a fortune so circumstanced by an act of her own, or of the donor. Consider, what will be the effect of this void deed of revocation. If he had joined with her to revoke that settlement, and appoint new uses, he could not have rescinded that afterwards; because he had affirmed the deed by acting upon it. If he had acted honestly upon it, as in the case I have put, he could not have set that aside; his counsel are to shew, that he may, because he has acted dishonestly upon it; which at present I think rather a vain attempt.

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I never had a doubt about this case. If it is to be considered upon the ground of its being against a rule of judicial policy, the arguments for Mr. *Bowes* would have had great weight. The law conveys the marital rights to the husband, because it charges him with all the burthens, which are the consideration, he pays for them; therefore it is a right, upon which fraud may be committed. Out of this right arises a rule of law, that the husband shall not be cheated, on account of his consideration. A case of this kind came before me a few days ago. A woman adult, about to marry an infant, made a settlement in contemplation of that marriage, in which he joined, though an infant, for the purpose of expressing his consent. As it was upon fair consideration, and no fraud to draw him in as an infant, I thought, the circumstance of its being fair would bind him, though, as an infant, not capable of consenting; according to which I held the settlement good, as she was capable of conveying; and as it was a public and open transaction, with the consent of the family, and consequently no fraud; though his being privy to it would not have concluded him from any rights as being an infant. A conveyance by a wife, whatsoever

The burthens to which a husband is liable are a consideration for his marital rights, upon which therefore fraud may be committed.

Infant, to express his consent, joins in a settlement by a woman in contemplation of marriage with him; he is bound thereby, if on fair consideration,

and no fraud; as where the transaction is public, and with consent of the family; though his being privy would not have concluded him from any rights as being an infant.

Conveyance by a woman under any circumstances, and even the moment before marriage good *prima facie*; bad only, if fraud; as where made pending the treaty, without notice.

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may be the circumstances, and even the moment before the marriage, is *primâ facie* good; and becomes bad only upon the imputation of fraud. If a woman during the course of a treaty of marriage with her makes without notice to the intended husband a conveyance of any part of her property, I should set it aside, though good *primâ facie*, because affected with that fraud (11). As to the morality of the transaction, I shall say nothing to that. They seem to have been pretty well matched. Marriage in general seems to have been Lady *Strathmore's* object; she was disposed to marry any body, but not to part with her fortune. This settlement is to be considered as the effect of a lucid interval, and, if there can be reason in madness, by doing this she discovered a spark of understanding. The question, which arises upon all the cases, is, whether the evidence is sufficient to raise fraud. Even if there had been a fraud upon *Grey*, I would not have permitted *Bowes* to come here to complain of it. But there was no fraud even upon *Grey*; for \*it was with his consent; and so I cannot distinguish it from a good limitation to her separate use. Being about to marry *Grey* she made this settlement with his knowledge; and the imputation of fraud is, that, having suddenly changed her mind, and married Mr. *Bowes*, in the hurry of that improvident transaction she did not communicate it to him; but there was no time, and could be no fraud, which consists of a number of circumstances. It is impossible for a man, marrying in the manner *Bowes* did, to come into Equity, and talk of fraud. Therefore the decree must be affirmed with costs; but let him have all just allowances as to what he paid when in receipt of the profits, and as to the annuities, which are declared not to be disturbed by the decree (12).

(11) Post, Vol. II, 194. In *Blanchet v. Foster*, 2 Ves. 264, the husband was not relieved against the wife's bond given without his knowledge, but for valuable consideration in respect of an antecedent debt, pending the marriage treaty: but it was added, that concealment of such securities and debts is not to be encouraged.

(12) This decree was affirmed

upon appeal to the House of Lords, 19th July, 1797. 6 Bro. P. C. oct. edit. 427. There is an early precedent of a settlement equally provident, established by a decree of Lord *Coventry*, in the case of *Sir Richard Grenvil v. The Earl of Suffolk*, Lord *Clarendon's Hist.* vol. iii. book 8, p. 536. *Peel v. ———*, post, Vol. XVI, 157.

ANONYMOUS.

1789.

March 5th.

**M**OTION by the *Solicitor General* to have deeds, which had been brought into Court, delivered up to a devisee. The heir at law was not a party, nor had he notice, nor was the will established against him, though a recovery had been suffered under it.

Deeds not delivered out of Court to a devisee, unless the heir is before the Court,

*Lord CHANCELLOR.*

All parties having an apparent right, as an heir at law (13), must be brought into Court, before the Court will do any thing, which may affect their right: otherwise I might order these deeds to be delivered up to a party having no right.

(13) If Plaintiff claims to have the will established, it is necessary to make the heir at law a party; not, if he only claims a title under the will. *Lewis v. Nangle*, 2 Ves. 431.



WADDLE v. JOHNSON.

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1789.

March 5th.

**T**HE bill was for an injunction to stay execution upon a verdict against the Plaintiff for 1530*l.* upon which an injunction was granted, on paying the amount of the damages and costs into the Bank, in order to apply to the Court of Common Pleas for a new trial; which application was made, and granted; and a verdict again found for the Defendant, but for nearly 100*l.* less than before; some sums having been disallowed.

The *Solicitor General* on the part of the Defendant moved for the money paid into the Bank, with interest, and all the costs. No interest had been given in the Common Pleas, because it was supposed, it would be provided for in this Court.

*Mr. Mitford*, for Plaintiff.

The sum last recovered only, and the costs of the last trial, are to be paid to the Defendant; but the costs of the former must be returned to the Plaintiff.

Upon a second verdict the same as the first, but for a less sum, the last sum recovered, only, and the costs of the last trial, ordered to be paid out of money in Court upon an injunction to stay execution on the first; the costs of which are to be returned.

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It was so ordered.

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## LADY MARKHAM v. DICKENSON.

*March 5th.*

After injunction dissolved upon the merits. Motion to stay trial of ejectment till full answer to the amended bill refused with costs.

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A LEASE had been made by tenant for life under a power, which it did not exactly pursue; but the remainder-man had permitted the lessee to continue in possession. The remainder-man disposed of his interest to the defendant; who brought an ejectment against the lessee. The bill was brought by the lessee for an injunction upon the ground of a confirmation by the remainder-man, and an allowance to the Defendant in respect of the right of the lessee, which allowance was denied by the answer. The injunction was dissolved upon the merits, and the bill being amended, a motion was \*made to restrain the Defendant from going to trial, till he should put in a full answer to the amended bill.

*The Solicitor General and Mr. Mansfield, for Plaintiff.*

When the lease was made, the land was a perfect waste; the Plaintiff has laid out a great deal in improvements. The remainder-man, who might have given a new lease, has confirmed the estate by accepting rent; besides he has sworn, he did not mean lessee should be disturbed; and 600*l.* was expressly allowed for Plaintiff's interest. There might be much doubt even at law, whether this did not amount to a confirmation; and under these circumstances even a jury would not permit him to recover possession; which would be to pervert the law to the purposes of fraud. Lord *Mansfield* has often given opinions to this purpose, particularly in *Goodright v. Straphan*, *Cowp.* 201; where it was determined that re-delivery by *fême* after the death of *baron* of their joint deed, affecting her land, binds her without re-execution; and circumstances alone may be equivalent to re-delivery. This judgment was founded upon *Co. Litt.* 36. *2 Roll's Abr.* and *Perkins*. But there must be an Equity for somebody in respect of this sum given as a consideration for allowing this lease to be valid; which must be refunded, if the condition is not complied with. The sole question is, whether Defendant shall be permitted to proceed at Law, till he puts in the answer.

*Mr. Lloyd, for Defendant.*

This motion must be refused with costs. The Defendant purchased this estate, not expressly subject to this lease; but  
to

to be subject in general to the leases then existing upon it, and in his answer to the original bill denies the allowance. The sole question is, whether a tenant for life having a power to lease reserved the real value of the estate, which he had power to reserve; we insist he has not. It is ruled by Lord *Hardwicke*, 2 *Ves.* 19, that where an injunction has been dissolved upon the merits, there cannot be a new one without a particular case (14). This application was not made till the cause was within ten days of trial; and they now come upon an amended bill filed only last term, to which we have appeared. But the mere act of filing an amended bill is not sufficient. They do not swear the facts could not have been put in the original bill. Your Lordship thought, it was a mere question of law; and if they have a right at law, they may make use of it at the trial.

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*Solicitor General*, in Reply.

The rule in *Vesey* is misapplied. The injunction was not dissolved upon the merits, except, as they then appeared. The true question is, whether in Equity the purchaser will not be considered as having bargained with the vendor, that he will not disturb this lease. The vendor purchased this for the lessee; always accepted the rent; never meant to disturb it; and made an allowance for it.

*Lord CHANCELLOR*.

There is no pretence for it.

The Motion was refused with costs.

Costs given.

(14) *Bliss v. Boscawen*, 2 *Ves. & Bea.* 101. See the references, post, Vol. XI, 569.

WILKINSON v. STAFFORD.

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July 9th, 10th,  
and 13th.


**S**MITHSON, sen. was seised, and possessed of several freehold and leasehold parts of *Berkeley* colliery in *Durham*, together

Account decreed against a trustee, who having engaged

the trust property in an adventure, afterwards renounced it for the trust, and declared it to be on his own account. Though no part of the trust money actually laid out.

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together with the way-leaves, waggon-ways, steaths (15), and other accommodations appertaining to them, in partnership with *Humble*; who was also settled, and possessed in his own right of other freehold and leasehold parts of the same colliery. The keel trade, viz. the keels or barges, and the profits arising from fitting (16) the coals, and conveying them to the ships belonged exclusively to *Smithson* alone. *Smithson* died in 1766, having devised his moiety of the said collieries, with all his interest in the way-leaves, waggon-ways, steaths, keels, &c. and all his ready money, debts to be called in, and his iron chest to his two sons-in-law, *Moore* and *Stafford*, and his two clerks, *Nicholson* and *Waterland*, who had principally carried on the business for him, and whom he desired to be retained for that purpose, in trust for his three grand-children, till they should attain the age of 21; to carry on the said collieries in the same manner he had done; and to use his keels, way-leaves, &c.; and not to advance, or lay out any more money upon the \*said collieries without the consent of all the trustees, or the survivors; but after deducting the necessary expences of carrying it on, and of maintenance for the devisees, to lay out the surplus upon security at interest for his three grand-children, to be paid them at the age of 21, with a bequest over, if they should die before that age. The keels and the profits of that trade he gave exclusively to his grandson *Smithson*, one of the devisees. After the death of the testator, the trustees carried on the trade under the will in partnership with *Humble*. Soon after in 1766, *Moore* and *Waterland* being dead, *Humble*, *Nicholson*, and *Stafford* entered into an agreement by deed, to carry on the collieries they had, and any other they should take, in partnership. In 1768 *Humble* agreed to purchase another colliery, called *Topt-hill*, when the existing lease should expire in 1769. Upon that account his purchase was not completed till the 30th of *July*, 1770, when a fine was levied. The purchase-money was 4185*l.* to be paid by instalments of 1100*l.* every year, till the whole should be paid off. Upon the 6th of *April*, 1770, they began to

(15) Places on the bank of the river, whence the coals are shot into barges to be conveyed to the ships. (16) i.e. Shooting coals from the steaths into the keels.



to work this new colliery, and continued to work it with the *Berkeley* colliery; and in consequence of a regulation among the trade, that only a limited quantity of coal should be raised; the same quantity, that before was sent from the *Berkeley* colliery alone, was afterwards supplied by both. Upon the 31st of *July*, 1770, a deed was executed by *Stafford*, renouncing any concern in the *Topt-hill* colliery in right of the trust estate; and declaring, that his interest in it was upon his own account. *Smithson*, being on very bad terms with his uncle *Stafford*, in 1786, filed a bill calling on him to account for a third of a moiety of the profits of the *Topt-hill* colliery, and all the profits of fittage, &c.; and afterwards made a general assignment of all his property, real and personal, to the Plaintiff; and, being in very bad circumstances, was arrested at the suit of an inn-keeper for 16*l.*; and a detainer was lodged against him for another small debt. While he was in prison, a treaty was set on foot for a compromise between his uncle and him, which after a delay of two years, occasioned by the claim Plaintiff would have by the assignment, was completed; and *Smithson* executed a release to *Stafford*, in consideration of 500*l.* with part of which sum he was set at liberty. The Plaintiff filed a supplemental bill. The Defendant was himself entitled to the other two-thirds of the collieries devised by assignment of his son, one of the devisees, and of the representatives of the other, \* who was dead. It was proved, that the Plaintiff was a trustee for *Smithson* in several transactions; and that Defendant knew that Plaintiff had sold some houses for him.

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*Solicitor General* and Mr. *Mitford*, for Plaintiff.

This compromise will not interfere with the relief prayed, because executed in such a manner. It is proved, that Defendant knew Plaintiff had acted as agent for *Smithson* on several occasions; and his knowledge of the assignment occasioned the delay of the compromise. Therefore he is affected with notice. If *Smithson* had not made that assignment, which was general, he would himself have been entitled to the account of the profits of this colliery, which was taken, and improperly given up by the trustees. Testator intended, his collieries should be carried on for the benefit of the de-



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visees; but the working the *Topt-hill* colliery was exceeding prejudicial to those of *Berkeley*; for the quantity of coals be sent to the *London* market being limited in consequence of the regulation of the trade, and the two collieries being in consequence of the agreement of 1766, between *Humble* and the trustees, considered and worked as one, the same quantity of coals, which might have been got from *Berkeley* alone were after that taken from both; and consequently the *Berkeley* colliery was not worked out so soon, and so a great expence caused to the proprietors. Besides the way-leaves and other accommodations of the *Berkeley* were exceeding convenient if not absolutely necessary for working the *Topt-hill*. The agreement between *Humble* and the trustees was probably to prevent the separation of those parts of the colliery, which *Humble* held in partnership with the trust estate from those, which he had in his own right. That deed was intended to carry on the collieries in partnership, and to take new leases of collieries, way-leaves, &c. It is only necessary to inquire, whether this colliery was taken for the purpose of that agreement. It was recited in the instruments, that it was taken on the footing of the partnership, which was for the benefit of the trust estate, not for their own; therefore to be worked in moieties for *Humble* and the trust estate. It certainly was managed for the trust till execution of the deed of renunciation, which was subsequent to the time of beginning to work the colliery; and there was no reason to execute that instrument, unless it was considered, that the right did before exist in the *cestui que trust*. The renunciation was upon terms stipulating benefits for the trust estate. It was clearly a species of bargain between *Humble* and the trustees acting for themselves. The way-leaves obtained by persons interested in *Smithson's* collieries could only be used by those claiming under them; therefore to work the *Topt-hill* it was necessary, that new way-leaves should be provided, that it should be worked with the other. A trustee is not to deal for his own benefit with himself. This Court will make him answerable for the consequences, whether an advantage or a loss. The parties knew that rule; for they recite, that the trustees doubtful of the success of the undertaking declined engaging the trust estate therein. It is proved

Humble

Humble and others, that the colliery had been effectually won before; all, that remained, was what is called the second working; which consists in digging out the pillars, which had been left, after the first, to support the roof; but which are much larger than necessary merely for that; this being the usual way of working coal mines; and attended with no hazard; except, that they must take certain precautions against, what they call, creeps and thrusts; the former being where the damage arises at the bottom; the latter where the roof falls in. Upon the day of the renunciation it was capable of being worked to advantage. Defendant ought, if he meant to deny this, to shew, that at the time of this agreement, a survey had been taken of the state of the colliery, and that it would be attended with hazard. Any trustee meaning to act fairly would have done so. He does not say, that any thing arose previously to alter the case. He was not apprehensive of engaging the trust property in an adventure; for he did engage it in another colliery, called *Hag-green*, which he was to win, as well as work, which is much more hazardous. Supposing the trust estate to be entitled to a moiety of the profits of the colliery, the question of fittage follows of course. Under the will Defendant could not have fitted any part with his own keels. That being contrary to the will, he must have accounted for all the profits of the transaction. Supposing the other question determined, there is no difference between the *Topt-hill* colliery and the others, in which testator was engaged.

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Mr. *Mansfield* and Mr. *Scafe*, for Defendant.

If the release was fairly obtained, and no notice of the assignment; that is an answer to the bill. It was perfectly fair; not solicited by the Defendant; but it was by *Smithson*, and by many for him; and was considered as an act of bounty to a nephew. There is nothing in the assignment, that can include this demand: nor notice to the Defendant, that it did. He knew some houses were sold by Plaintiff acting as agent for *Smithson*; but nothing more. This demand being of so peculiar a nature, such a release is not undone by this assignment and such notice. There is no case, where a trustee has been called on to account for the profits of an estate bought

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bought with his own money, and worked at his own risk. There is a talk of damage to the trust estate in the bill and evidence, but none proved. If he had pursued any conduct injurious to it, he as a trustee might be made to answer for it; but this bill does not apply to such a case; being confined to an account of a third of a moiety of the profits of the colliery, and all profits of fittage. If the demand is to be made out at all, it must be upon the words of the will. The trusts are to carry on the collieries of the testator, and use his keels as he had done; but there is nothing authorising them to take a lease of much less to purchase any new colliery; but the direction to put out to interest for the benefit of his grand-children all the surplus remaining, after deducting the necessary expences of the said colliery, shews clearly an intention, that the trustees should not think of embarking in any new undertaking for the trust: but they might at their own risk.

Lord CHANCELLOR.

You had better consider it upon the words of the will. It says, they are not to lay out any more money upon the colliery without consent of all the trustees, from which seems to be implied, that with the consent of all it might be done; and there seems to be no other way but by taking new leases.

For Defendant.

One great article is for employing workmen, another for steaths, another for keels and barges; but not to engage in new collieries. The words "*said collieries*" go through the whole will. That express direction to put out the surplus money to interest would, even if there had been no express restriction against taking new collieries, have amounted to one. They had no authority to do so, especially in this hazardous trade.

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Lord CHANCELLOR.

They surely might have taken new leases of steaths.

For Defendant.

If it became necessary for the collieries they had in trust to provide new steaths, keels, &c. they might do so; not otherwise.

who. They might do any thing absolutely necessary for carrying on those collieries, but could not embark in a new adventure. This is not a trust estate under the will. To make it so, this supposed damage is taken in aid to make Defendant a trustee for *Smithson*; but that will not help the question. Suppose the trust estate had suffered; the trustee must make good any injury done to it by his imprudent conduct; but that would not give any demand on this colliery. Suppose it taken without any reference to the trust; and that mischief happened to the trust estate; the new colliery could not be expected to answer it; but the trust estate would notwithstanding have a competent remedy: therefore the question of damage has nothing to do with that of trust. The question is, whether there is any thing in the case to determine, that the *Topt-hill* colliery was taken and worked for the trust estate; and so taken, that it could not be given up, so as to be separated from it, and to be taken for the benefit of the trustee himself. In the partnership deed of 1766, there is nothing of the trust estate; but I do not dispute, that it was in their contemplation at the time. There is no proof this colliery was ever worked for the trust estate, and it is denied in the answer. The agreement of 1766 was not with a particular view to the trust estate. When *Humble* took this lease, he took it under the idea, that by the deed of 1766, he was bound to take it for himself, *Nicholson* and *Stafford*. The day after the title was complete, the renunciation as to the trust took place. If they were obliged to take it on account of the trust, it could only be by the deed of 1766; for the will forbids, or at least does not direct, them to do so. Half of the purchase-money, which was a considerable sum, was to be paid by the Defendant (17). If that colliery had gone to ruin, and the Defendant had been brought to account for 2000*l.*, laid out upon it, he would have been told, he could not thus adventure the trust money. He understood that, and determined not to engage it. If he had parted with the trust money, it might be said, that if he made great advantage of it, he should account for that, though he should not be cleared in

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(17) The consideration for *Nicholson's* share was his superintending the work.

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in case of a loss. But it is not so; the first instalment upon the 3d of *March* was paid with his own money; it is not pretended that it was with the trust money. It was an actual purchase subject to risk from its nature, in which a trustee was not at liberty to adventure. If he had consulted a lawyer, he would have been told so; and when the thing was entire, and nothing advanced out of the trust estate, it was competent to him to say, he would not, though he had intended it, but would embark in it on his own account. If the trustees had expressed it to have been taken on the trust account, they would have been wise in putting an end to it; and were competent to do so, having created the obligation. Any man in his senses would have retracted. One creep is proved, whereby seven or eight acres were lost. The manner of the transaction is strongly in his favour. Though he would not engage the trust property in this uncertain adventure, he stipulated for it every advantage he could by stipulating for a compensation for the use of the way-leaves, &c.; that 3000 chaldrons should be fitted in the keels of the trust estate; and that *Humble*, who had a right to carry down those way-leaves 6000 chaldrons from the *Lee-field* colliery, belonging to him in his own right, should be restrained from the exercise of that right during the working of the *Topt-hill*; from which the same quantity was to be carried down them. The other trustee acted in concert with Defendant. The profits of fittage would have been much smaller, if the price of coals had continued as in 1770; but, by what those in the trade call a regulation, and others call a combination, the price was raised; and consequently the profits increased: therefore it was not to be considered at the time as a very advantageous bargain, and that Defendant was induced by that circumstance to renounce for the trust, and take it himself.

Lord CHANCELLOR.


The great difficulty is as to his having taken it himself. Can a trustee abandon the interest of an infant *cestui que trust* to himself? Your agreement must go to that point. Supposing he had been directed by the will to lay out the money in land; if having made a bargain, he thought fit afterwards to abandon it, there could be no question about it. It would be considered,

that he had made, what he afterwards thought to be an improvident bargain. But the doubt is upon his having taken it himself, and made advantage of it.

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For Defendant.

The general rule is, that a trustee having an estate in his hands cannot deal with that estate for his own advantage; but there is no case, that if a trustee makes a bargain for the infant, and afterwards thinks, there is good reason to abandon it for the infant, and take it himself, he may not do so. But I might admit that; for what I found myself upon is, that there is no direction in the will of that sort: if there was, it might be otherwise. This is no otherwise taken for the trust, than as *Humble* thought himself bound by the deed of 1766 to take it for the partnership; and they recite, that they thought themselves bound, when they came to talk of it; but it was never worked for the trust. It is said, but not proved, that they had taken another colliery for the trust. I should not have been sorry to have had that fully explained; for in fact there was a lease of a colliery with liberty to determine the lease, if he should find it not workable; which is very different from this. But the question of fittage, if the other question should be doubtful, does not follow the right to the colliery. Defendant was a fitter; and there is nothing to restrain him from carrying on his own trade, because he took a trust. A trustee cannot be prevented by the circumstance of being so from carrying on his own trade. Suppose the colliery was taken for the trust, he might certainly employ his own keels or those of any other fitter. If he had taken the colliery fraudulently with a view to take advantage in fitting, it might be said, it was a breach of trust with a view to the profits of fittage: but he acted in his regular business; and there was no trust upon him to employ the keels of the testator, except as to the *Berkeley* colliery. As to the damage, it is scarcely made out by evidence, that any did arise to the *Berkeley*; it was worked out in seven or eight years after. The delay was occasioned by the regulation; and was compensated by a sale at a better price. Their being worked as one colliery made no difference; for when the regulation took place, a greater portion of coals was allotted to them on that account. This cannot be considered as a security under the will; for 2000*l.* was sunk in the purchase. It is more hazardous

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hazardous than a new colliery on account of the thrust and creeps; and more expensive from the timber necessary to support the roof: therefore he would not have been justified in doing it with the trust property. The lease was granted to *Humble* alone: Defendant was not mentioned except in the deed of the 31st *July*, wherein he declines engaging the trust money.

Lord CHANCELLOR.

I have no doubt about the case. The testator was possessed among other things of these two articles of property; an interest in coal mines consisting of several freehold and leasehold collieries in partnership with *Humble*; who also had some freehold and leasehold collieries of his own: in fact all the testator's interest in the collieries was carried on in partnership with *Humble*; and they mutually communicated their private interests to each other. They were under no contract of perpetual duration; but it was a voluntary contract, that had proceeded down to the time of making of his will, and even down to his death. These interests consisted not only of the coals to be taken from each estate respectively, and in common; but also of the several accommodations of way-leaves, steaths, &c. He had also an interest in the keel trade; that is that establishment of vessels, by which the coals are conveyed to the ships, for which there is a customary payment. This branch of the trade was exclusively his; *Humble* had nothing to do with it. By his will he bequeathed all his estate to trustees. It is immaterial to state more of it, than is in question in this cause. He gave all his interest in the collieries, with the accommodations I have mentioned, to trustees upon trust; first, for the maintenance of his three grand-children; then to carry on the adventure in the same manner he had done. The adventure by the will was to be carried on, till the devisees arrived at the age of 21. There were other contingencies in the will; as upon the death of the grand-children before 21 it was to go over to others of the family; and it is necessary to remark, that it was in his contemplation, that there might be an accumulation. The keels he gave to the sole use of his grand-son *Smithson*. Upon this will it was contended, that it did not empower the trustees to manage any colliery, but those testator had at the time of making the will, or at least at the time of his death;

but that is a very improbable idea to impute to the testator; that, having this sort of property, he should direct it to be carried on at all, if under restrictions, which in certain events would be inconvenient; as if *Humble* should not agree; and without his agreement it would be impossible to be carried on at all. Besides the accommodations were taken for a general, not a particular adventure. The testator directs, that all his ready money, debts to be called in, &c. together with his iron chest, shall be given by his executors to *Nicholson*, his clerk, one of the trustees, to carry on the same. It then proceeds to say, "I hereby order, that no more money shall be advanced for it without the consent of all the trustees, or the survivor of them; but all above the necessary expences of the colliery to be laid out upon security at interest." Upon that clause it cannot be contended, that it can relate to any other trade, than that in which the grand-children were interested (for it seems he was engaged in two trades.) Upon the face and terms of the will exclusively of the general intention, I am of opinion, that, provided these parties had without fraud, but with the utmost skill and diligence they could use, applied this property even to what had turned out a losing adventure, they would have been justified. But it does not depend upon the particular construction of the will alone: for in the year 1766 they put the same construction upon this will, that I have done, by entering into an engagement with *Humble* of this sort; and this is what the testator intended. As he had a power to direct the manner, and did direct it, they took it, they were to proceed in that manner; they agree to carry it on as an improving and extending adventure; and by so agreeing to carry it on have bound themselves to each other as much and as anxiously as possible, by mutually consenting not to take any estate of that sort separately from the partnership; and that whoever took a lease it should be for the mutual benefit of all. They were to take way-leaves, &c. for the new adventure; they took way-leaves, which were accommodated to the collieries, they had taken. With regard to the *Hag-green* colliery they proceeded upon this idea, and accounted for that. They had taken it with a view to this extent of adventure. In 1768 a reversionary lease of the *Topt-hill* colliery was taken. It was not worked out; but consisted only of walls and pillars; which every

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every person, who knows that country and the custom of it, knows, are of a much greater size, than is necessary for the mere purpose of supporting the roof. It is their manner of working them; and must be done at this risk, which frequently occasions the loss of many lives. This lease was taken by *Humble* in 1768. The price was to be subject to such abatement, as the peculiarity of the property should require; and was to be discharged by instalments of 1100*l.* a year. In *November* 1769 they took possession, and began to work it in the *April* following. It is argued for Defendant, that the trustees had advanced no trust money; and there is no proof, that they did, upon the subject. Supposing that true, and that *Humble* by the original contract in 1766 was bound to communicate this to the trustees, a case might arise new in *specie*, and which may put the Court to some difficulty upon the supposition, that the original trust did not warrant them to embark the trust estate; that they had entered into an engagement to do it, but did not actually apply the trust money. I think, if a trustee having engaged an infant's name in an adventure, yet afraid of the double and unequal risk of answering in one case for all the profit, and in the other for all the loss, does not embark the infant's property, it would be too unreasonable to make him answer only for using the infant's name; and now I speak against an express authority, and that a pretty strong one, the case of *Morton Eden*, which was called a case of a confederacy; and came first before Lord *Bathurst*, and was carried to the House of Lords, and, if I do not much mistake it, goes that length of saying, that he shall; but I cannot agree to that. But here they engaged much more deeply; for though there was no previous duty to embark the infant's fortune, yet they did so; and it is exceedingly clear, that such a trustee, having entered into such an engagement, cannot get rid of it by selling to himself (18). But here he could not even to another; because though no part of the trust money was

Trustee not answerable for having engaged the infant's name in an adventure, if, afraid of the consequences, he does not engage the property.


Contra *Morton Eden's* case in the House of Lords.

Trustees having engaged trust property in an adventure cannot sell either to himself or another.

(18) As to the purchase of trust property by the trustee, assignees, solicitor or commissioner, under a commission of bankruptcy, &c. see *Ex parte* *ter*, post, Vol. VI, 617, 625, 631. *Ex parte James*, VIII, 337. *Coles v. Trecothick*, IX, 234. *Ex parte Bennett*, X, 381, and the note III, 752.

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was actually laid out, yet by the deed of 1766 the infant's estate was appropriated to this purpose. In the agreement of 1770 the infant's way-leaves, &c. are made subservient to this at an estimated price. There is in this case another article, in which their affairs are blended together in such a manner, as the Court will not hear of; that is, the general agreement of the trade, that no more than a limited quantity of coals should be raised from the infant's estate *nominatim*. It is plain, they dealt with the world as if for the infant's estate; and it is remarkable, that what was allowed to be the produce of the two collieries should be just equal to what was before the produce of the *Berkeley* alone. The Court will look with great jealousy on the conduct of trustees; and where a person has the arrangement and management of two estates, in one of which he is interested personally, in the other as trustee, the Court will not allow him to act for his own or the infant's benefit, as he pleases. This therefore according to the intention of the testator, according to the idea agreed upon as his intention between *Humble* and the defendant, according to the will, and in every point of view is clearly to be considered as part of the estate of the infant, and therefore he is entitled to an account of the produce of the colliery; and is not to be turned over to a remedy against the trustee for the injury done to the trust estate. Supposing that so, he must also account for such profits, as arose by conveying the coals in other keels than those of the testator: for the testator had a right to direct, that his keels should be employed, and has done so. But it is said, the release will stand in the way. Upon that head I refer to Defendant's own evidence; by which it is proved, that the Plaintiff was a trustee for *Smithson* in several transactions; and not only that, (which might be sufficient) but this assignment was the very thing talked of the last time they conversed with *Smithson* in the prison. The subject of their conversation was the Plaintiff's claim; and after *Smithson* had been for two years tampering with his uncle for a compromise; it went off on account of this assignment. But if that was not so, I think, making this compromise with a man in gaol would be rather obnoxious, and it is not such a compromise, as ought to stand (19). He must therefore account for a third of a moiety

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 The Court views trustees with jealousy; and in case of two estates, one in trust, the other belonging to the trustee, will not permit him to act for his own or infant's benefit, as he pleases. Release after a general assignment no answer to the assignee, if notice. Defendant's knowledge that assignee was on many occasions a trustee for assignor may be sufficient to affect him with notice. Compromise with a man in gaol, though not at the suit of the party with whom it is made, not to stand (19).

of

(19) 2 *Ves.* 635, an agreement with a man in gaol may be good, if having proper assistance and advice, and in a fair manner.

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v.
STAFFORD.

of the profits of the *Topt-hill* colliery, and for all the profits, which might have been derived from the employment of *Smithson's* keels in conveying the coals from both collieries; making all just allowances, and all papers to be produced before the Master. Reserve the consideration of interest and costs.

[44]

1789.

July 24th.

ISAAC v. GOMPERTZ.

The Court will not keep money after the party is entitled to it even at his request.

A PERSON entitled at 21 to money invested in stock in the name of the *Accountant General* having attained that age petitioned to receive a dividend only; and Mr. *Lloyd* for the petition said, it was his wish, that the money should still continue in the name of the *Accountant General*.

Lord CHANCELLOR refused to make such order, and ordered him to take the money.

Upon another question,

Lord CHANCELLOR.

Stock cannot be appropriated to support of a permanent charity; but must

Stock cannot be appropriated to the support of a permanent charity; because in its nature fluctuating. The proper order will be to sell the stock, and appropriate the money arising from the sale.

be sold, and the money appropriated.

1789.

July 25th.

ROBINSON v. TAYLOR.

Resulting trust for the heir at law as to the produce of the sale of real estate, not exhausted by a trust, in which it was combined with the

TESTATOR gave the residue of his real and personal estate to his executors, upon trust to sell the real, and place the money out at interest, and thereout and out of the remaining part of his personal estate to pay annuities and legacies; directing the residue to remain at interest during the life of *Mary Stuart*; the interest for her separate use, if separate from her husband; otherwise to accumulate until her death;

death; with power to her to charge his said estate with 400*l*. No farther trust being declared, the heir at law was at the hearing of the cause (20), decreed to be entitled to so much of the fund as was produced by the sale of the real estate.

1789.
ROBINSON
v.
TAYLOR.

Upon a petition to vary the minutes, the *Solicitor General* and Mr. *Mitford*, in support of the right of the personal representative, insisted, that the testator had made his real and personal property an aggregate fund for the purposes of the trust; in which case, they contended, the personal representative had a right to the residue as undisposed of; and cited *Ackroyd v. Smithson* (21), from a note of the *Solicitor-General*; and * *Digby v. Legard* (22), in both which cases, they said, this was determined.

[*45]

Mr. *Piggott*, for the heir at law, said, these cases were considered at the hearing.

Lord CHANCELLOR (after reading the note of *Ackroyd v. Smithson*).

The general rule is, that where property is given for particular purposes in trust, nothing more is subject, than those purposes require; and if not exhausted, there shall be a resulting trust for the residue, after the purposes are answered, as to the real for the heir at law, as to the personal for the personal representative. *Ackroyd v. Smithson* differs from this case: for there the whole of the testator's property, both real and personal, was disposed of; and the residue arose only by lapse upon the death of some of the legatees. But this is claimed upon the particular words of the will. Here the personal estate would have been sufficient without the aid of the real; and in that case I think, it would be very hard to take it from the heir at law. In my opinion there is a mighty difference between a residue arising from lapse, and such a residue as this. At present my opinion is in favour of the heir at law; but if you are dissatisfied with it, it is a proper subject for a re-hearing: but
I will

(20) 2 Bro. C. C. 589.

(22) Trin. 1774. Both these

(21) March 4th, 1780. 1 Bro. C. C. 503. cases are in 3 P. Will. 4th edit. 22, n.

1789.

ROBINSON
v.

TAYLOR.

Two days' notice sufficient for a re-hearing.

I will not have it argued now upon a petition to alter minutes. We must come a little more closely to it, and make farther inquiry into the bearing of those cases: therefore let it stand over with liberty to the party to apply for a re-hearing; for which two days' notice is sufficient.

It did not come on again (23).

(23) See, in the course of this work, *Rashleigh v. Master*, post, 201, and the note in 204. *Chitty v. Parker*, Vol. II, 271. *Swann v. Fonnereau*, *Halliday v. Hudson*, III, 41, 210. *Kennell v. Abbott*, IV, 802, and the references in the note, 805. *Wheldale v. Partridge*, V, 388, and the notes, 394. VIII, 227. *Brown v. Bigg*, *Ripley v. Waterworth*, VII, 279, 425. *Sheddon v. Goodrich*, VIII, 481. *Williams v. Coade*, X, 500. *Berry v. Usher*, *Wilson v. Major*, XI, 87, 205. *Gibbs v. Ougier*, XII, 413. *Wright v. Wright*, XVI, 188. *Hooper v. Goodwin*, XVIII, 156. *Van v. Barnett*, *Walter v. Maunde*, XIX, 102, 424. *Hill v. Cock*, 1 *Ves. & Bea.* 173, and the note, 176. *Gibbs v. Rumsey*, 2 *Ves. & Bea.* 194. *Kellett v. Kellett*, 1 *Ball & Beat.* 533. *Smith v. Claxton*, 4 *Madd.* 414. *Banks v. Scott*, 5 *Madd.* 493. *Jones v. Mitchell*, 1 *Sim. & Stu.* 290.

[46]

1789.

Nov. 10th.

3 *Bro. C. C.* 8. Will by a wife of her separate property, and its produce, whether derived from her husband or a third person, is good.

FETTIPLACE v. GORGES.

IN 1772 Plaintiff, being much involved, and obliged to go abroad, conveyed by deed all his estate to trustees, upon trust to apply the rents and profits in discharge of his debts, reserving a life annuity of 400*l.*; one moiety to be paid to himself for life, the other to the sole and separate use of his wife, not subject to the debts or controul of her husband. Under this deed she received 200*l.* a year from the trustee. She had also 1000*l.* stock, bequeathed by Lady *Juliana Page* in trust for her sole and separate use. After the death of Mrs. *Fettiplace* a writing was found, signed by her, in these words, "I leave all my personal estate and every thing belonging to me to my niece *Diana Gorges*." Two sums of 1000*l.* and 1900*l.* stock were found at the death of Mrs. *Fettiplace* vested in trustees for her sole and separate use. The bill was brought by

by the husband, claiming these sums and the dividends accrued since the death of the wife. Plaintiff permitted Defendant to obtain administration with the will annexed, to be without prejudice to the question between them.

1780.
FETTIPLACE
v.
GORGES.

Mr. Mansfield and *Mr. Graham*, for Plaintiff.

Plaintiff is entitled; as there is nothing authorizing his wife to make a will. If any thing, it must be the deed respecting the annuity: but this is no contract before marriage upon consideration of fortune, or any other consideration than that he was obliged to make a settlement. There is nothing in it implying an engagement on the part of the husband to give up that right, the law gives him as such. It is simply an authority to trustees to receive, and pay an annuity to her separate use: but it does not follow from such appropriation, that he shall by implication be deprived of that common law right to the property acquired by his wife, as being bound by law to make a provision for her. There are general *dicta* in the books, but no case, that where property is given in this manner by a husband to a wife, she may dispose of it by will. As to the bequest to her, how from such a bequest as this without a particular act of the husband can she acquire a right to dispose of it? If a person gives it in this manner, that notwithstanding coverture she may dispose of it, * if a husband, knowing it, permits his wife to accept it, he may be considered as assenting: but where it is merely given for her separate use, nothing more is inferred, than that it shall not be subject to his debts; but it does not follow, that if it remains her property at her death, he shall not enjoy the common right of a husband. It does not appear, how the sum of 1900*l.* arises, but only, that it was part of the property found at her death in trustees for her. There is nothing to shew Plaintiff gave up any right to this sum.

[*47]

Lord CHANCELLOR.

The question is, whether it is not incident to separate property to dispose of it by will.

For Plaintiff.

That has never been yet decided.

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1789.

Lord CHANCELLOR.

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GORGES.

Yes it has, in *Peacock v. Monk*, 2 *Ves.* 190. The whole is in this narrow compass: stock to the amount of nearly 8000*l.* is vested in trustees as of the separate use of Mrs. *Fettiplace*, who has given it by her will. Her separate estate is accounted for in this manner; by the annuity, and by a gift of stock to her sole and separate use by a third person. The single question is, whether the incidents to sole and separate property do not follow it.

For Plaintiff.

In point of fact that precise point has not yet been decided; that in case of a devise to the sole and separate use of the wife, that *ex vi terminorum* shall imply this power. It has been decided, that where it is for pin-money or maintenance a wife shall have a power to dispose of her savings; and decided even against an heir at law, that lands shall be charged, rather than that. In *Peacock v. Monk* Lord *Hardwicke* goes very fully into the reasons of it; where he is made to say, that as to the personal estate, where there is an agreement between the husband and wife before marriage, that she shall have to her separate use either the whole or particular parts, she may dispose of it by act in her life, or by will; though nothing is said of the manner of disposing of it; yet in a note of Mr. *Joddrell's* it is stated, that there was a power of disposition given. * But here the bequest is from another quarter. Your Lordship will not imply this power, unless compelled to it, as contrary to the maxims of the Court, and the marital rights. *Hearle v. Greenbank*, 1 *Ves.* 299.

[* 48]

Lord CHANCELLOR.

Did not that case turn upon a double question of infancy and coverture?

For Plaintiff.

It did. According to what Lord *Hardwicke* has there said, and to *Grigby v. Cox*, 1 *Ves.* 517, where any thing is settled to the separate use of the wife, she is a *fême sole* as to that; but in both cases there is an express power given. Where it comes from another quarter, there is no case to support this disposition; and to say, she shall dispose of it, as being given to her separate use, is going a great way. 2 *Vern.* 270; where
 personal

personal property is given to the separate use of a wife, it is to be construed strictly; as that it is only during coverture. This deed must be construed strictly. The Court will not suggest considerations, which might have occurred, but take the fair and necessary sense of the words. A power of disposing in all its various ways cannot be raised by implication.

1789.

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FETTIPLACE
v.
GORGES.

Solicitor General, for Defendant.

Wright v. Lord Cadogan is an authority for this disposition. In *Hearle v. Greenbank* there is an express power as to the real estate; but as to the personal Lord *Hardwicke* says, "it is given to her separate use, in which case it is the rule of the Court, that a *feme covert* may dispose of it," and concludes by saying, that as she was above the age of 17, her will was an appointment of the personal.

Lord CHANCELLOR.

The first case upon the subject is a very old one in *Tothill*; that where a woman from her separate stock has saved a sum of money, she may dispose of it. It does not appear, what the word "*stock*," means. I know, there is a vast number of cases upon it: but I have always thought it settled, that from the moment, in which a woman takes personal property to her sole and separate use, from the same moment she has the sole and * separate right to dispose of it (24). It is incident to dispose of the savings out of her personal estate. She certainly might enjoy it; and as to the produce, that is all merely personal property. If she makes no disposition, the husband succeeds as next of kin, not in consequence of the marital right (25). Upon the cases I have always taken this ground; that personal property, the moment it can be enjoyed, must be enjoyed with all its incidents. The bill *must be dismissed*.

The moment a woman takes personal property to her sole use, she has the sole right to dispose of it.

[*49]

If no disposition of wife's separate property, husband succeeds as next of kin, not by marital right.

(24) *Pybus v. Smith*, post, 189. *Rich v. Cockell*, Vol. IX, 309. *Parkes v. White*, XI, 209. *Brown v. Like*, XIV, 302, and other authorities in the note V, 17.

(25) Lord *Loughborough* expresses a contrary opinion, post, Vol. III, 246, 7, in *Watt v. Watt*; and *Ld. Eldon*, in *Garrick v. Lord Camden*, XIV, 372. See also *Bailey v. Wright*, XVIII, 49.

1789.

Nov. 12th.

3 Bro. C.C. 11.
Ne exeat regno
 upon affidavit
 of wife against
 husband re-
 fused.

SEDGWICK v. WATKINS.

MR. KING moved for a writ of *ne exeat regno*. The only evidence to support the application, which was by a wife against her husband, was her affidavit; and the case of *Lady Strathmore v. Bowes* was mentioned for it; and 2 Vent. 343; where in a bill by a wife it was alleged, that the husband intended to go abroad in order to avoid the effect of a judgment; and the writ of *ne exeat regno* was granted.

Lord CHANCELLOR.

Wife's evi-
 dence against
 husband allow-
 ed only for se-
 curity of the
 peace; but she
 cannot sustain
 indictment
 against him.

No doubt she may make application for it: but the question is, by what evidence she can support it, and whether her affidavit can be read to affect her husband. For security of the peace (26) indeed *ex necessitate rei* she may make an affidavit against him; but cannot sustain an indictment. I do not know one case, either at law or in this Court, where the policy of the law allows it in any other instance. It was once done in the time of Queen *Elizabeth* by Serjeant *Puckering*, and refused immediately after by Lord *Ellesmere*, when he came to the seals; and has not been done since. I have always taken it to be a rule, that a wife can never be evidence against her husband, except in the case I have alluded to (27).

[50]
 1789.

Nov. 10th,

13th, and 16th.

3 Bro. C.C. 12.

Bill to have a
 voluntary deed
 delivered up,
 dismissed.

Cross bill to
 execute it, re-
 tained for a
 year, with li-
 berty to sue
 upon a cove-
 nant in the
 deed.

COLMAN v. SARREL.

GEORGE DAVY, 11th June, 1767, assigned by deed to trustees 1000*l.* 3 per cent. Bank annuities in trust for *Joan Sarrel* for life, in case she should survive him; and after her death for such child or children of her, and in such proportions, as she should appoint; with a proviso, if she should live in any other place, than that, in which the grantor should reside, to be void, but not otherwise. The deed contained a covenant by him, that if he should survive her, he would pay the

(26) *Heyn's case*, 2 Ves. & Bea. ville, and *Percy v. Powell*, in 182. *Dobbyn's case*, 3 Ves. & Bea. Mr. Beames's *Brief View of the Writ of Ne Ex. Reg.* 35. 40. 183.

(27) See post, Vol. X. 55, 6, 2nd edit.
 in *De Manneville v. De Manne-*

the interest and dividends to such of her children, and in such proportions, as she should appoint the principal. At the time of the deed his wife and her husband were living. The consideration expressed in the deed was for some satisfaction for the injuries, the grantee had received from the wife of the grantor. No actual transfer of the stock ever took place. *Joan Sarrel*, having survived the grantor, appointed by will 600*l.* of this fund to one child, and 200*l.* each to two others. *Colman*, as executor of the grantor, filed a bill to have the deed delivered up, as being voluntary. The children filed a cross bill to have the deed carried into execution by a decree upon the executor to transfer the stock to their trustees. By the evidence of Plaintiff in the original bill it appeared, that the witness had gone into a room, in which he found *Davy*, his wife, and Mrs. *Sarrel*; that Mrs. *Davy* had her hand to her head, as if she had received a blow, and complained to the witness, that her husband had beaten her. That at the time of the execution of the deed Mrs. *Sarrel* had threatened to kill him, had pursued him through the town with a knife, and had said, she had purchased a shroud for him. In 1770 he applied for a *supplicavit* against her, and she was bound accordingly. He resisted this deed in his life, when threatened with a suit upon it.

1789.
COLMAN
v.
SARREL.

Solicitor General and Mr. *Cooke*, for Plaintiff in the original bill.

Upon the face of this deed it appears to be *pro turpi causâ* (28); and therefore they can have no assistance in this Court. The *only consideration expressed in the deed proves it fraudulent; for by the evidence it is false. As to the relief prayed, if there was nothing more in the case, than that the deed is not available, that would have a tendency to dismiss the bill; because if it is not a complete conveyance of the stock, which will not pass without an actual transfer, what occasion has the Plaintiff to come into Equity, when nothing can be made out against him at law; according to your Lordship's determination

[*51]

(28) The security must be for future cohabitation, in order to affect it as given *pro turpi causâ*. *Amb.* 643. *Gray v. Mathies*, post, Vol. V, 286.

1789.

COLMAN
v.
SARREL.

determination the other day in another case; that where an instrument cannot be proceeded upon at law, there is no ground to come into this Court for relief against it. But there is a ground for relief in this case; because upon the covenant in the deed an action would certainly lie; therefore it falls within the class of cases upon deeds obtained through improper influence; yet not being within reach of the law, they would prevail there; to prevent which a Court of Equity will interpose. The grantor appears either from the influence of an improper affection, or a well-founded apprehension, not to have been so well master of his understanding, as to be fit to be considered *sui juris* in any transaction with this woman. Whatever it might have been in other affairs, she had gained such an influence on his fear or affection, that he had no will of his own as to his property, when she told him her's. Whenever she demanded and threatened, he never could resolve to refuse her.

Mr. Mansfield and Mr. Grimwood, for Defendant.

That he had an affection of some sort for this woman cannot be doubted: but that there was any thing criminal in it, is not suggested either by their bill or answer to the cross bill. What was the foundation of their intimacy does not appear; but there was nothing criminal in it.

Lord CHANCELLOR.

Clause in a deed of assignment of stock from a married man to a married woman, that she shall live, where he resides, though suspicious, is not sufficient ground to hold it *pro turpi causa*.

Want of allegation shall not prevent

the Court from looking into the consideration.

I do not understand it so. The clause in the deed conveys that idea to my mind; but not sufficiently to found a decision upon it. But supposing it so, the want of collateral allegation shall not prevent the Court from looking into it. I suspect it to be so, but it may be otherwise; and a suspicion is not an authority to go upon. He lived seventeen years afterwards. She certainly behaved very ill; they both behaved very ill; but the ill behaviour is not pointed to the time of the execution of the deed. There is no one article applicable to that; and that single clause is not sufficient information to go upon. The shortest way is to dismiss the bill (29). As to the cross bill;

(29) See post, *Hayward v. Dimesdale*, Vol. XVII, 111, and the note, V, 371.

bill; the deed now comes to be considered as a mere voluntary agreement; what can they make of it (30)?

1789.
COLMAN
v.
SARREL.

For Plaintiffs in the cross bill.

It is not a mere voluntary agreement, but a voluntary gift of stock, not to take place till after his death; and therefore they are in the same situation as legatees of stock. The consequence is, that his executors at his death become trustees under this voluntary gift for the persons, to whom it is given; as they would have been, if he had given it by his will. Then there is a covenant in the deed, which creates a debt; and the party comes to be paid out of the assets as for any other debt. Either an action of debt or covenant would lie; but they come into this Court in the common way. It is not a case for making perfect a defective voluntary agreement; but here is a deed under seal conveying to trustees. It is an equitable gift instead of a legal one.

Lord CHANCELLOR.

If you have it at law, there is an end; if not, the question is, whether you can have a voluntary agreement executed in Equity. The difficulty is to shew a case, where any voluntary gift has been executed in Equity. You are now upon a question, whether a Court of Equity will set up a deed, you cannot proceed upon at Law.

For Plaintiffs.

Villars v. Beaumont, 1 Vern. 100: *Boughton v. Boughton*, 1 Atk. 625: 1 Vern. 365: *Lechmere v. Earl of Carlisle*, 3 P. Will. 222. Besides in the present deed there is a covenant. In *Williamson v. Codrington*, 1 Ves. 514, Lord Hardwicke retained the bill, and would not drive the party to a remedy at law. The single question is, whether a voluntary assignment by deed of stock is not sufficient to pass that stock as against volunteers; or in other words, whether a man may not, reserving, as he intended to do, the stock, and receiving the dividends during his life, make a final gift of it to take place after his death by deed, as well as by will; so as to lay an obligation upon his executors, as if he left it as a legacy. The stock

(30) 1 Atk. 10. *Matthews v. Lee*, 1 Mad. 558.

1789.
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 COLMAN  
 v.  
 SARRELL.

stock was transferred as far, as it could be by deed. They come as to the transfer upon the effect of a deed completely executed, asking nothing more. There are many *dicta* in the books, but no cases exactly like this. They are only, where the Court has been called upon to aid defective conveyances, by which a volunteer claims against an heir at law; and there the person claiming against the heir must produce a conveyance by a proper instrument; which, if he cannot do, the heir's right attaches; of which he shall not be deprived by a defective attempt of his ancestor. The only case is 1 *P. Will.* 60 (31); where a voluntary settlement was allowed to raise a trust upon consideration of blood between two half brothers; and the authority of that case has been questioned; for to be sure it was a bad reason. There are *dicta* in the abridgments which the original cases frequently do not support; which all resolve into the right of the heir at law. There is no rule preventing this disposition of stock in Equity by deed. It is a disposition of a *chose in action*. It is true, it is not exactly like other *choses in action*; because there is a mode, by which to most purposes the legal interest may be transferred, viz. the common mode at the Bank; but it is in truth a *chose in action*; and there can be no doubt, that a voluntary assignment of a *chose in action*, though to take place after a man's death, is good in Equity to make the executor after the death of the assignor a trustee for his assignee. There is no rule or principle preventing such a disposition as this from operating exactly in the same manner as a legacy by will. It must imply the same obligation upon the executor as a will to transfer the equitable interest after his death. Though freehold cannot be conveyed *in futuro*, stock and *choses in action* may. There is no express covenant in the deed, that the executors shall transfer, though certainly the sense is tantamount to that; if there were, there are cases to be found, in which voluntary covenants have been executed here, as that in *Vesey* in which Lord *Hardwicke* went much at large into the reasons. The argument against it was upon the nature of the covenant being voluntary. It was strictly not so clear as this; for it was a general covenant obliging himself, his heirs, executors, and administrators to warrant the plantation, negroes, cattle, &c. upon which no action of debt would

(31) *Watts v. Bullas*. See the notes in the 4th edition.

would lie. Here, I think, it would; for wherever there is a covenant to pay a sum certain, or which can be reduced to certainty, action of debt will lie. Here, as she directed the shares, it is matter of calculation; for the covenant is to pay according to such shares, as she shall direct. The case in *Vesey* has gone a great way farther; for there nothing could be recovered but damages. These children are entitled out of the assets. The reason of those cases giving effect to voluntary covenants would, if he had said in terms "I covenant that my executors shall transfer, &c." have bound the stock; and her appointees would have a right to come here upon the ground of this interest; for if upon a general covenant to warrant, which gives a mere right to sue for damages, Lord *Hardwicke* at once gave relief in Equity, there is no doubt, that he would not have sent it to law in such a covenant, as I suppose. If that would be the effect of such a covenant, though this deed contains no words precisely amounting to it, yet in Equity that effect can be produced.

1789.

COLMAN  
v.  
SARREL.

For Defendants in the cross bill.

Probate of her will in the Ecclesiastical Court is not sufficient: it ought also to have been proved in this Court.

Lord CHANCELLOR.

The proof in the Ecclesiastical Court is sufficient, as far as it goes; if there is any thing particular in it, the ulterior proof may be proceeded upon in this Court.

Probate of will in the Ecclesiastical Court sufficient, as far as it goes; farther proof if necessary may be proceeded on in this Court.

For Defendants.

The only case for it is that in *P. Will.* and in *Goring v. Nash*, 3 *Atk.* 189, Lord *Hardwicke* expressly denies that to be law.

Lord CHANCELLOR.

If you can bring an action, you may. The covenant seems to be but in aid of the form of the transfer. The only case coming near it is that in *Vesey*, but it is not so clear a case, that a Court of Equity will take it out of the hands of a jury. Where a deed is not sufficient in truth to pass the estate out of

Where deed is not sufficient to pass the estate,

but party must come into Equity, Court never executes a voluntary agreement.

1789.  
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 COLMAN
 v.
 SARREL.

Where necessary to come to Equity to raise an interest by way of trust, there must be at least a meritorious consideration.

the hands of the conveyer, but the party must come into Equity, the Court has never yet executed a voluntary agreement. To do so would be to make him, who does not sufficiently convey, and his executors after his death, trustees for the person, to whom he has so defectively conveyed; and there is no case, where a Court of Equity has ever done that. Whenever you come into Equity to raise an interest by way of trust, you must have a valuable or at least a meritorious consideration. Nothing less will do (32).

For Plaintiffs in cross bill.

One of the executors, who disputes this deed, is himself a subscribing witness.

Lord CHANCELLOR.

Perhaps he was called in to execute it without knowing the contents; that is the best excuse he can make.

Upon application for costs to the trustee in the deed;

Lord CHANCELLOR.

No costs to any party claiming under a contract not meritorious, even though recovered upon; not even to a trustee.

I shall not give him his costs. Let those, who manufactured the deed, give them to him. It is impossible for me to give costs in such a case as this. Every one, who hears this case, though it does not amount to duress, knows, that it is not meritorious. Even if you recovered upon this deed, I would not give costs to any one claiming under a contract, such as it is (33).

Upon application to have some provision made as to the costs of the action;

Lord CHANCELLOR.

If the trustee or representatives are insolvent they must give security for the costs of the action.

(32) 1 *Fonb. Treat. Eq.* 41. (33) The trustee's costs were *Ellison v. Ellison*, post, Vol. VI, afterwards refused on petition, 656. 2 *Cox*, 206.

The decree was, " That the original bill should be dismissed without costs ; that the cross bill should be retained twelve months, during which time the Plaintiffs in it should be at liberty to bring an action upon giving security, to be approved by a Master, to answer the costs of it; on non-compliance with these terms the bill at the end of the year to stand dismissed with costs."

1789.
COLMAN
v.
SABREL.

The Plaintiffs in the cross bill did nothing till the 1st November, 1790 ; when they applied to have the time for bringing the action enlarged for six months; which the *Lord Chancellor* thought reasonable, and ordered. Upon that order they commenced the action without giving security for the costs. Upon the 11th * Mr. *Mitford* moved to amend the minutes of the last order by inserting the terms contained in the decree; and the *Lord Chancellor* granted the motion, declaring he meant not to discharge the terms, when he enlarged the time.

[* 56]

ANONYMOUS.

1789.
Nov. 29th.

PETITION in consequence of a private act of parliament for the sale of an estate and the disposition of the money arising from it; in which act *inter alia* it was enacted, that the money arising from the sale should be invested in the Bank in the name and with the privity of the *Accountant General*.

The petition was for an order for that purpose.

Lord CHANCELLOR.

From the petition as stated I have nothing to do with it. It appears by that, that the act of parliament has given me no authority to make any order about it. Money is frequently to be paid in by the authority of the Court; frequently the Court has a right to look into it. Here it is to be paid to the *Accountant General*. When an act of parliament does refer it to this Court either by petition, or in any other manner, I think myself bound, as every other magistrate is bound, where an act of parliament gives authority, to obey its directions; but here is no authority given upon the face of the petition. The mere petitioning gives me no authority to act; for the *Accountant General* is obliged to receive it by the act of parliament.

Where money is directed by an act of parliament to be paid to the *Accountant General*; he is bound by the act to receive it, and the Court will not make an order for that purpose.

1789.

Dec. 4th.

DORAN v. ROSS.

3 Bro. C.C. 27.

Marriage settlement not altered in favour of the intention; the recital being too general, and nothing *dehors* the words to do it by.

ANN DANCASLE previously to her marriage with *James Doran*, settled her property by indenture reciting generally, that she was seised of an estate in fee, and possessed of 324*l.* short Bank annuities; which she conveyed to trustees for the following purposes: as to the real to *Doran*, and his intended wife, and the survivor for their lives; remainder to trustees to preserve contingent remainders; remainder to the children in tail in the usual way with provisions for maintenance and education, and powers of leasing and sale with consent of the husband and wife, or the survivor; the money to be laid out with the same power of changing the securities; remainder, if no children, to the husband in fee. As to the annuities, to the separate use of the wife and her assigns for life; then to the use of the husband for life; then from and after the decease of *J. Doran* and his intended wife, and the survivor, among the children at twenty-one, or marriage, as tenants in common; but if no children, or being any, they should die before twenty-one, or marriage, then if the wife survived the husband, to her absolutely; but if she should die in his life, then “*if her nephew Terence Tierney should be alive, the*”
 “*trustees shall immediately after her decease sell so much, as*”
 “*will raise 500*l.* to be paid to Terence Tierney, his exe-*”
 “*cutors, administrators, and assigns, for his own use; and*”
 “*that they shall stand possessed of the residue in trust for*”
 “*him and his assigns during his natural life;*” and after his death to sell so much as would raise 1000*l.* for the appointment of the wife, if any; the residue in trust for *J. Doran*, his executors and administrators. There were powers to change the stock with consent of the husband and wife. The marriage took place; they had no children; the husband survived the wife; the sum of 500*l.* was raised, and paid to *Tierney*; but as he claimed also under this deed to have the annuities for his life, *Doran* brought this bill against him and the trustees.

Solicitor General and Mr. *Mansfield*, for Plaintiff.

The question is, whether upon the particular limitations in this deed, in the event of the Plaintiff's wife dying without
 issue

issue in his life, he is entitled to receive these annuities during his life, or whether they are to go to the defendant *Tierney*. As the parol evidence is only to the general intent, it cannot be read. But at all events *Tierney* has only an estate for life; and it will revert to the Plaintiff subject to the power reserved to the wife. The question depends upon the true construction of this deed. If that construction is made, which might be the intention of the parties, it will be consistent, otherwise it is inconsistent with itself. The limitation to the husband after the life estate of the wife is as absolute and unconditional an estate for life as possible. These words "*from and after the decease of J. Doran and his intended wife and the survivor,*" must rule the whole: upon them every subsequent part must depend. No farther trust could consistently with the words arise till after the death of the survivor. It must mean upon the words in general, that the trust to *Tierney* must take place consistently with the preceding trusts; that is, not during the life of the husband; or else the words must be altered by inserting the word "*his*" instead of "*her*;" as that immediately after his decease the trust for *Tierney* should take place. This would make it consistent, and *Tierney* would come in, as he ought, after the death of the husband. But the other construction makes her do away every thing, she had before done for the husband; for *Tierney* is a much younger man than the Plaintiff, who could have no chance of surviving him. But there is another ground. The words "*him*" and "*his*" may mean the Plaintiff; and that is the construction put upon it by *Tierney* and the trustees; for the dividends of these annuities were paid to the Plaintiff for some time, till some person looking over the deed thought, there was a ground for this claim. In general the words "*him*" and "*his*" would refer to the last antecedent, that is *Tierney*; but if meant to signify him, they are inaccurate; for the word "*assigns*" is improper. The power of consenting to change the securities is given to the husband, and not to *Tierney*. We have not got the will of Mrs. *Doran*; but it is suggested, that she bequeathed the sum of 1000*l.* over which she had a power of appointment, to *Tierney*, after the death of her husband.

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 [59]

Lord CHANCELLOR.

That would be of no use; for it would only shew, what she understood it to be; but I cannot take her interpretation.

Mr. Selwyn, for Defendant.

It is material to consider the situation of these parties previous to the marriage. *Doran* had nothing of his own. Upon the settlement it appears, he contributed nothing; for it recites her title, and does not state, that he has any thing. She having dominion over the whole, the real is settled in the common form: which, there being no children, he enjoys now. As to the rest; she being sole owner thought herself at liberty to dispose of it in this manner. The parts of the settlement relating to that must be taken together. The clause, in case of children giving it to the husband after death of the wife for his life, only respects his being obliged to maintain them. According to Defendant's construction nothing is to be changed, but the Court is to determine grammatically.

Lord CHANCELLOR.

No argument concerning whose it was, or what it was natural to do with it, is material. The single question is, whether the words necessarily infer, that she meant to go contrary to what, she had done before. If the recital contained any thing, to which this phrase stood in contradiction, I might correct the phrase, as has been decided by former cases. But there is no instance, where there is not something *dehors* the words to do it by. In the former case I would have said, they had forgot, what they had stated in the recital. But here the recital is too general; and there is nothing in it, but with reference to what follows; and no case has gone so far. Then will the words "*immediately after her decease*," necessarily go not only to the 500*l.* but also to the trust of the annuities so as to make them accrue to *Tierney* for life, contrary to what she had before said. The objection as to the word "*assigns*" occurs upon both; for though she had a life estate, yet it is given to her assigns. The deed sets out without reference to any contingency. It gives to the husband an absolute estate for life; and that is given even against children, or any disposition by her. I think, the intention is in Plaintiff's favour.

I have

I have no doubt, they did not mean to take away this estate for the benefit of *Tierney*, when it was not done for the benefit of the children; but I am afraid, I have not foundation enough to go upon; it would be too hazardous a construction. The bill must be dismissed; but without costs. I cannot give costs against the pretensions of *such a Plaintiff, as this; for I, think it was intended in his favour, if they had known how to express themselves (34).

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Costs refused.

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(34) Settlement may be re- 593; but not against creditors. formed according to the inten- *Jenkins v. Quinchant*, 596, n. tion, declared in the recital; Will made upon mistake of post, 171. *Payne v. Collier*. The testatrix not altered to comply *Marquis of Townshend v. Stan-* with the intention, where no *grove*, Vol. VI, 328. *Beaumont* words to shew, what the will *v. Bramley*, 1 Turn. 41; or by a would have been, if that mistake letter on the marriage, post, had not been made. *Smith v. Barstow v. Milvington*, Vol. V, *Maitland*, post, 262.

CRAVEN v. TICKELL.

1789.

Dec. 4th.

IN March 1787, Plaintiff a builder, having already begun the house in question, entered into an agreement with Defendant; by which Plaintiff was to complete it as a public-house according to a plan given by Defendant's surveyor, *Wilmot*. Plaintiff was to lay out 300*l.* upon it. All the expence above that sum was to be defrayed by the Defendant. The house was to be completed by *December*; and from the time of its being finished Defendant was to accept a lease for seventy years at the yearly rent of 35*l.* 10*s.* There was a proviso, that the workmen should be paid according to the measure and value. After the parties had proceeded some time according to the agreement, *Wilmot* got possession of the plan by a stratagem, and refused to re-deliver it, and endeavoured to stop the workmen. Plaintiff however proceeded, and finished the house, of which he gave Defendant notice, desiring him to fulfil his part; and, no answer being received, brought the bill for specific performance, and an account of what was expended above 300*l.* This bill was resisted upon the

Small deviations from a plan agreed upon for building not material; otherwise, if obstinate or corrupt.

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the ground of deviations from the plan, which according to the evidence consisted in having a step at the door; which was said not to be usual in public houses; there were also two chimnies in the club-room, which, though originally intended, was contrary to *Wilmot's* subsequent directions; and there was some variation as to the bar; by all which the expence was increased 50*l*. There was also evidence, that it would be a very great rent for a private house. It was also objected for the Defendant, that Plaintiff had undertaken to procure a licence, and failed.

[61]

Mr. Mansfield and *Mr. Alexander* for Defendants, objected to a witness for Plaintiff.

He was employed in the building, and Defendants are to pay according to measure and value; and if they are right in their defence by proving a deviation; he cannot make a title to be paid; so he is interested; as he swears to entitle himself to payment.

Lord CHANCELLOR.

Witness good,
 who can recover
 nothing in
 the suit.

He is to be paid by his employer, whether Plaintiff or Defendant; but not by force of this agreement; all, it amounts to is, that beyond 300*l*. the expence shall be defrayed by the Defendant. The witness can recover nothing in the present suit; which is a sufficient answer. But besides he can claim nothing under this agreement, which is not with him, but only between Plaintiff and Defendant. If the work is not done according to the plan, he cannot maintain an action against Defendant; but he may against Plaintiff. If otherwise, he may against Defendant.

For Defendant.

If the plan has been departed from, Plaintiff is not entitled to relief in a Court of Equity. Indeed he could not recover at Law; and if he could, your Lordship would leave him to it. Plaintiff thought himself bound to procure a licence; for he applied to the Justices; having represented it to Defendant as the constant practice, and assured him, it would be granted. The practice is, when a number of houses are built together so as to form a new town, the builder makes one of them a public

public house for the convenience of the inhabitants; and a licence is granted to him upon that account.

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Lord CHANCELLOR.

That practice of granting a licence to the house instead of the person is very improper. The agreement is very loose. Small deviations from the plan would not affect it much; but if there is any obstinate or corrupt deviation, that would materially. The Defendant has got the plan, and yet does not produce it in evidence. The Plaintiff's case is, that Defendant's surveyor withdrew the plan, hoping thereby to turn the burthen upon Plaintiff, and so to defeat him. The circumstance of *not producing the plan is a signal defect in Defendant's case. *Wilmot* has got possession of it, keeps it, and then talks of variation from it.

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For Defendant.

The particular variations were so expressly stated in the answer, that it was thought, the plan would be unnecessary. They might have pointed their interrogatories to that, but have avoided it, and examined in general terms. But if the answer and evidence is not a sufficient bar to the bill, yet at least it may operate in diminishing the sum to be paid. It is clear there are deviations, which are not contradicted; they occasioned the additional expence of 50%; therefore if they are not a sufficient impediment to a specific performance, yet this sum ought to be allowed; and the Master ought to be directed to allow it; or inquire what the additional expence amounted to.

Lord CHANCELLOR.

The lease was to be dated from the time the house was completed; therefore there must be an inquiry as to that. The Master will state, when it was completed according to the contract. It is immaterial, that the house was actually begun before. Here the agreement is, that the lessee under-leases it to Defendant; agreeing to lay out 300%. upon it to be employed under the direction of Defendant. The lessee allows lessor to go on with it: then they quarrel. If they had managed that quarrel right, it might have put an end to the Plaintiff's going on to build, and then they must have finished

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 ~~~~~  
 CRAVEN  
 v.  
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the house *instantly*; it is evident, it was a kind of house to be finished immediately; but they could not stop Plaintiff's workmen. He undertook to proceed, and therefore came under an obligation to execute the contract, and to finish; and the lease cannot be given till the house is finished. Therefore the Master must inquire first, whether the house is completed, and if so, when it was completed according to the contract (35); and then Defendant must be directed to accept a lease according to the terms of the contract. If the house was not finished in 1787 they cannot bind Defendant to take a lease from that year. Then the Master must inquire, what money has been expended above the sum of 300*l.*; and interest must be given upon it since it was laid out.

[ 63. ]

For Defendant.

This debt will not carry interest; it is a mere simple-contract debt; and even upon a common action at Guildhall, interest would not be given.

Lord CHANCELLOR.

Interest given in Equity for a simple-contract debt; as at law, for every debt detained, either by the contract, or in damages.

The money referred to inquiry is the money laid out by the Plaintiff in execution of the contract. Money paid to the workmen, who were to be paid by the Defendant, is money advanced for him, and it is the constant practice at Guildhall (I do not speak from my own experience, but from conversations I have had with the Judges on the subject) either by the contract, or in damages (36), to give interest upon every debt

(35) As to specific performance of a covenant to build, see post, 235. *Moseley v. Virgin*, Vol. III, 184. of a surplus in bankruptcy interest subsequent to the commission was confined to debts, carrying interest by the con-

(36) 1 *Atk.* 151. 2 *Ves.* 589. tract, post. *Ex parte Mills*, Vol. II, 295. *Ex parte Keck*, 1 *Ves. & Bea.* 342. 1 *Rose*, 317. *Ex parte Williams*, 1 *Rose*, 399. *Ex parte Greenway*, *Buck*, 412. *Ex parte Boyd and Paton*, 1 *Glyn & Jam.* 285, 332. *Butt-gess's Case*, 2 *J. B. Moore*, 745. until the stat. 6 *Geo. IV.* c. 16. *Lyon, Coop.* 29. But in the case see s. 57. 132.



debt detained. The interest depends upon the house being completed.

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Immediately after the decree was pronounced, it appeared, that a licence was obtained, upon which the parties agreed, that upon Defendant's paying 300*l.* into Court, he should be let into possession immediately.

BENNET v. BATCHELOR.

1789.

Dec. 7th.

3 Bro. C. C. 28.

**FRANCIS HAMLIN**, after devising his real estate, gave a legacy to a god-daughter; and then to *Jane Powel* all his household goods, books, book-case, linen, wearing apparel, and all other unbequeathed goods and chattels, that should be in his possession at the time of his death, except the legacies he had given, or should give. He then gave her all money due to him, that she might discharge the demands upon him. Then he gave to other persons certain articles of plate and furniture, and some pecuniary legacies. Then came a clause charging the said *Jane Powel* with payment of his debts, legacies, and funeral expences. He appointed a legatee of 10*l.* for mourning, *Jane Powel*, and two others, to whom no legacies were given, joint executors of his will. *Jane Powel* died in his \* life. The bill was brought by the personal representative of *John Bennet*, sole next of kin to the testator, for an account of the residue against the surviving executors. Defendants insisted, that the bequests to *Jane Powel* were specific, not residuary; but if residuary, that there was nothing to turn them into trustees.

Residuary legatee dying in life of testator, executors are trustees of residue for next of kin, though no legacy to them, except 10*l.* to one for mourning. Bequest of "all other unbequeathed goods and chattels," is residuary, notwithstanding a subsequent bequest to the same person of debts due to testator.

[ \*64 ]

*Solicitor General*, for Plaintiff.

Testator bequeathed in terms describing almost every species of his personal property. Wherever the residue is given to a person, who dies in life of testator, the executors are trustees, whether they have legacies or not. This has been often decided. *Bishop of Cloyne v. Young*, 2 Ves. 91.

*Mr. Mitford*, for Defendants.

Testator has not in the common form made any residuary disposition, but the legacies to *Jane Powel* are specific; there-



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 BENNET
 v.
 BATCHELOR.

fore the residue belongs to the executors as undisposed of; and those specific legacies by her death in life of testator sink into the residue, and go with it to the executors. But if not residuary, there is no case, which comes up to this; for there is nothing in the will to turn them into trustees for next of kin with respect to a lapsed disposition, where no legacy has been given to two of the executors. The trifling sum given for mourning to one, even if it had not (37) been for mourning (in which case it has been considered merely as a compliment) would not exclude them; but certainly not if given for mourning, as here. But as there are two executors, to whom nothing is given, there must be some other ground. Plaintiffs rely upon the words "*all other unbequeathed goods and chattels*," but those words ought to be construed by the words preceding; and must mean goods of the same kind before disposed of, and not generally. The will is inaccurate in using those general words. But the subsequent clause shews, he did not mean to include every species of personal property; for the next clause gives her all money due to him at his decease; which therefore he thought he had not given, when he gave the goods and chattels.

Lord CHANCELLOR.

He might not have known, that debts due to him would pass by those words "*goods and chattels*." It was only accumulation. He seems to have been anxious to dispose of every thing.

[*65]

For Defendants.

If these bequests are to be considered as specific, the title of the executors is clear; because the residue clearly is undisposed of; and if so, any specific legacy falling into it will go with it to the executors, and not to the next of kin. *Wilson v. Ivat*, 2 Ves. 166. This case is a decision in favour of the executor, supposing that the wife of the testator, who was one of the executors, but died in life of testator, was residuary legatee according to the report; but upon looking into the register it appeared to be different. *R. N.* died seised and possessed

(37) Contra *Sir John Strange*, 2 Ves. 166, who said twenty shillings would be sufficient.

possessed of real and personal; he devised a copyhold estate to his grand-daughter, and left other specific legacies. Then to his wife, whom he made one of his executors, he gave all his household goods, monies, and securities, whatsoever and wheresoever. That would not include leasehold estates; and therefore must be taken not as residuary, but specific. The question was, whether Plaintiff as next of kin was entitled to the residue, or the surviving executors; and the determination was for the executors. In the report it is clear, it was considered as specific; and that, being so, it fell into the residue. But if your Lordship thinks, that this because conceived in larger terms is residuary; yet there is no case, to make them trustees in such a case as this. The cases are certainly contradictory. In *Hunt v. Berkeley*, 1 *Eq. Ca. Ab.* 243, more copiously reported, *Mose.* 47, the determination was for the executors. *Owen v. Owen*, 1 *Atk.* 494, of which I have also a manuscript note. The ground upon which Lord *Hardwicke* determined there, was, that the residue was given to three persons in common as residuary legatees; and though they were also executors, yet Lord *Hardwicke* thought, the gift of the residue to them as residuary legatees shewed, the intent was not for them to take beneficially as executors: and in *Bishop of Cloyne v. Young*, he went upon the same idea. There after several legacies, and among the rest one to one of the executors, comes this clause; “*Item, after all my just debts and legacies paid, I give and bequeath the remainder of my estate real and personal, and whatsoever shall be due to me for half-pay, &c.*” and there broke off. The determination was for the next of kin, upon the ground that testator certainly intended a disposition; if in favour of the executors, it was his *intention, they should take by virtue of that disposition, and if so, it was clear, he did not intend them to take as executors; and therefore testator not having proceeded farther, so that it was doubtful, to whom he meant to dispose, but clear that nothing was intended for the executors as such, Lord *Hardwicke* thought, they could not take it as executors, and must be trustees for the next of kin. He took notice there of *Painter v. Salisbury*, 11th May, 1734, at the Rolls; where the residue was devised to the wife and son equally; and the wife was made executrix. The son dying in

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v.

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in testator's life, that lapsed moiety went to the next of kin and not to the executrix; and Lord *Hardwicke* said, the ground of that decision was, that testator had declared his intention to make a different disposition of the surplus of his personal estate; and that it should not go to his executrix by force of being executrix. But he did not think, there was sufficient ground to say, the executrix should be excluded by having a moiety. In *Dawson v. Dalton*, February 11th, 1752, Lord *Hardwicke* reasons the same way. He there says, the question of right is settled, that where a testator has given to his executors as residuary legatees, it is the strongest ground to shew, it is not meant, they should take as executors. *Man v. Man* (38), 2 *Stra.* 905; in that case the wife, being a distinct legatee and executrix,

(38) *Kennedy v. Stainsby, Eas.*
 1755.

Devise of legacy to executor, and also to next of kin; question as to surplus.

For *Plaintiff Executor*.—The Court has often let in proof to rebut the equity of next of kin; and yielding to every thing denoting an intent, that executor should have the surplus; and the disposing of all so minutely is tantamount to such intent; as in *Man v. Man*, 1734; where a surplus, arising by a lapsed legacy, was decreed to the executor; and in general, where it appears, testator believed, he disposed of all, it is to be presumed, he meant, that what should accidentally arise, should remain to the executor.

Lord CHANCELLOR.

The reasonable rule, which I much approve, and will not dis-

turb, is now established: that a legacy precludes the executor from the surplus; and justly so, to prevent fraud by the maker naming himself executor; which testator, not aware of the consequences, may permit. Was the maker to appoint a legacy to himself, testator would be immediately alarmed, and not imposed upon. Now the surplus goes by succession, as it were, under the statute to the next of kin. As to *Man v. Man* the Court might have considered, testator by a particular disposition did not intend, the surplus should go to the next of kin: but does not that, seeing he has taken notice of the executor, equally exclude him? I rather believe, the decree was upon circumstances now not appearing.

See *Nourse v. Fixck*, post, 344, and the numerous authorities there referred to.

executrix, was not excluded from taking two lapsed shares of the residue. *Page v. Page* (-39), 2 *P. Will.* 489, and *Mose.* 42, 2 *Stra.* 820, will be relied on for Plaintiff; where the whole residue was devised to the wife for life, and after her death to six by name equally to be divided, as tenants in common; and one of the tenants in common dying in life of testator, the next of kin succeeded in a claim of that lapsed share against the executor; but upon the ground stated by Lord *Hardwicke* in *Bishop of Cloyne v. Young*, that in that will and in *Painter v. Salisbury* it was to be implied, that they were intended to take no benefit as executor. In *Owen v. Owen* the same rule prevailed, but upon the same ground and reasoning. Therefore Defendants are not intended to be trustees. There are cases of a disposition of personal to be laid out in land for a charity; in which case executors are always excluded: but this is different; for there testator had given it, though illegally; and if the charity upon that account could not take; neither did the testator intend a benefit to the executors.

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Lord CHANCELLOR.

I have no doubt about it. If the question was recent, whether executors should be turned into trustees by implication, or by what sort of implication, I should acknowledge the difficulty of the original argument. But after so many cases upon the subject, and the law has been so well settled, I am under a difficulty to take any line of argument, unless that which appears to have been suggested by Sir *Joseph Jekyl* in that short note in *Strange*. He there seemed to go upon a difference between a lapse, and what is not disposed of. In case of construing intention it may have place; but not otherwise; for a lapsed legacy is a case, to which the will does not apply. At law executors take absolutely any beneficial as well as any nominal interest, where there is nothing serving as an intimation

No difference between a lapse and what is not disposed of, except for construing intention.

(39) In *P. Will.* the wife's life interest in the residue is not mentioned; and the six residuary legatees are stated to have been also executors. But Lord *Hardwicke* citing this case, 2 *Ves.* 99,

takes notice of the wife's life interest, and seems to have considered the wife as executrix. Mr. *Mitford's* statement agrees with Lord *Hardwicke's*.

At law executors take any beneficial interest, unless contrary intent.

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Costs given.

timation of an idea, that testator was not making a beneficial office, but merely a trust. But when he has taken from them in the same instant all, that could result beneficially to them; it is difficult to say, he meant, they should take any thing more than a trust. The difference, where it is given to a charity, appears impossible to state; the counsel left that without making a point, upon which any body could rest a single moment; it concludes the executors, but will not serve any other purpose. But if he has given, what the executors could take, to a stranger, he meant to make them trustees. Nothing could be so clear as his intention, and there is nothing in the other point. The prayer of the bill must be admitted *in toto* with costs,

1789.

Dec. 8th, 12th.

HABERGHAM v. VINCENT.

Administrator not brought before the Master by motion after a decree passed and entered, if any thing in it, affecting him by way of order to pay; otherwise, if only to witness what is done.

A DECREE had been made, passed, and entered, without having before the Court a personal representative, who became so by administration after the bill filed. A special motion was made to insert in the bill, that he was administrator, in order to bring him before the Master, upon the ground of saving expence to the parties; that they could not go to account without doing so; and that it was a mere slip in the bill. There was no opposition; but it did not appear that the parties consented, though they were competent, and had notice of the motion.

Mr. *Selwyn*, for the motion, acknowledged, there was no case for it. He said, it was likely the parties would consent: that on account of the decree it was a special motion instead of the common one to amend the bill; and that Lord *Talbot* once allowed such an amendment, but it was before the decree.

Lord CHANCELLOR,

It is quite a new thing. The alteration proposed is very immaterial; but the delicacy and difficulty is in the example I should set by altering a record of this Court, after it has been made

made up, and I have nothing more to do with it. You must get the consent of the parties; let it stand over for that; and I wish, you would put it into some other shape; for even if they do consent, I do not know, that I can do it. Let it stand to the next seal, and see, if there is any precedent for it.

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v.
VINCENT.

Lord CHANCELLOR.

If there is any thing in the decree affecting him by way of order to pay, it is beyond the course of the Court to have him brought before the Master in this manner; but if it is merely, that he may be a witness, to what is done, it is a proper motion. Look into the decree, and see how it affects him (40).

Dec. 12th.

(40) 3 *P. Will.* 371. *Farrer v. Wyatt*, 5 *Mad.* 449.

FOX v. MACKRETH.

1789.

Dec. 8th.

AN account was decreed against Defendant in 1788 (41) upon a bill filed some years before.

Motion upon part of Plaintiff for an order on Defendant to pay into Court a sum of above 13,000*l.* being the balance of the charges allowed against the Defendant by the Master in taking the account, and of the whole, without any deduction, of what Defendant alleged in his discharge, as appears by the Master's certificate, and Defendant's examination upon interrogatories before him.

The certificate was produced signed by the Master, and purporting to have been given at the request of Plaintiff's solicitor. There was no report.

Solicitor General stated great delay in the Master's office; and cited *Lech v. Stevens*, 7th April, 1769.

(41) 2 *Bro. Ch. Ca.* 400.

Before report Court refused to order balance of charges allowed against Defendant upon account, and the whole alleged in his discharge to be paid into Court upon certificate by the Master and Defendant's examination before him: but also refused a motion

to take the certificate off the file.

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Lord CHANCELLOR.

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 Fox
 v.

MACKRETH.
 No certificate
 by a Master as
 by *Accountant*
General, but
 there must be
 a report, in or-
 der to take no-
 tice of any
 thing in Mas-
 ter's office.

I never heard of such a thing as a certificate (42) by a Master, though the *Accountant General* gives one. I must have the report in order to take notice of any thing in the Master's office. If such a case of insuperable delay in the Master's office was brought before me, I would endeavour to find a remedy for so deadly a mischief; and I should wish it to come on in a more formal way, as by petition. Here the certificate is signed by a very honourable man, who, I am sure intended to do justice.

It stood over to give time to the Counsel to examine the case cited, and to consider whether to bring it on by motion or petition. Upon the 16th *December* it came on again in the same manner.

Solicitor General, Mr. *Mansfield* and Mr. *Ainge*, for the motion.

In *Lech v. Stevens* an order was made by Lord *Camden* upon an examination. In that case the executor admitted upon interrogatories before the Master, that he had received so much of the personal estate of the testator, and had purchased stock with it; and upon this examination an order was made for payment of money into Court. An examination before a Master is a record of this Court as much as an answer. It gets upon the record in the same manner. Office copies are given of it as of an answer, and the Court treats it as a record. There can be no injury to Defendant by granting this application; as credit is given to him for every thing, he has alleged in his discharge; and from his examination it appears, he cannot recollect another item.

Mr. *Selwyn* and Mr. *Hardinge*, for the Defendant.

As the certificate, a thing never heard of before, seems now to be given up, there is a cross motion to have it taken off the file. The case cited is quite different. There the bill was by an

(42) This expression is by no Master's inquiry. See an instance in *Carleton v. Smith*, post, short fact is the subject of the Vol. XIV, 180.

an executor for his own indemnity to have the account taken in this Court ; therefore there is strong presumption, that every thing done was with his consent ; and *volenti non injuria*. He admitted, he had received so much of testator's estate, and had purchased stock with it. It was not his own. It is taken for granted, Defendant will not make any objection to this charge upon him ; but he may object to the report ; and the Master may be satisfied with his objections without putting him to except. Defendant may bring in ulterior charges ; and it cannot appear, till the report made and confirmed, that there is a balance in his hands. There never was an instance of payment of money into Court in this stage of a cause. The equity of Plaintiff, if it can apply, must apply to every case, where upon a discharge, credited (for argument's sake) *in toto*, there is yet due to the side of the charge a larger sum ; even without insolvency or peril stated. This thing in large accounts must have happened constantly, without any suggestion of fraud ; and yet no instance is produced except that single case ; and in that there is a direct admission. Here at most it is but implied ; but the fact may depend upon a thousand circumstances, which cannot appear till the report. But supposing the equity proper after such an implied admission, yet this application is against all practice ; and though an alteration in the practice would in many cases be for the benefit of the suitor, it ought first to be published. The Court will not lay down a new general rule to bear upon this particular case. There has been no delay ; but Defendant intends to petition the House of Lords for an appeal the first day of next session, which is not long to wait ; and if the certificate continues on the file, it may prejudice him in the opinion of the Court.

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### Reply.

There is no difference between the admission in the case cited and the present ; for both were after examination upon interrogatories in the Master's office. The examination is a record of the Court, and the case cited shews, the Court will act upon it. The Court is only desired to act upon the admission of Defendant ; giving him the full benefit of all, he has claimed, and that long after the decree ; and he does not state, that



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that it is possible for him to recollect a single item, beyond what is allowed in his discharge. The appeal might have been lodged long ago, if there is not some purpose of delay, and if there is, this examination being before the Court, which it appears, Defendant owes this sum to the best of recollection, so long after the bill filed, without a reasonable probability that he is able to recollect any thing more on the subject, the Court cannot hesitate to grant the application. In taking the certificate off the file, if they have not informed the Master of their intention, such an application was never yet made in a Court of Justice.

Lord CHANCELLOR.

Motion for separate report; and proceedings *de die in diem*.

The question is, whether according to the practice, which has hitherto obtained in this Court, or what ought now to be laid down as the practice, it is competent to the Plaintiff, having obtained a decree for an account against Defendant, in this stage of the account so much appears to be due, to apply to have it paid into Court; and to call upon Defendant to pay it, if he does not believe, so much will appear to be due in the account. It depends a good deal upon the Court's decreeing, that a few years are not a sufficient time for the report to come in: and that there is no hope of procuring one in a reasonable time to enable the Court to give final judgment. I have known applications made for a separate report, and for proceedings *de die in diem*; but a motion of this sort never yet has been made; as it strikes me, never ought to be made; for you ought to have your report from the Master. But I will not order the certificate to be taken off the file. I doubt the propriety of the

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FORD v. PEERING.

Upon bill by heir at law for discovering and delivering up, or depositing,

THE bill was brought to compel Defendants to discover and deliver up title-deeds, or to have them deposited in some proper place; and also, (as was at first stated at the hearing,) title-deeds, against persons in possession of them as executors, and in possession of the premises by agreement with a tenant by the courtesy, Plaintiff need not state every link in his pedigree.

for an injunction from committing waste : but in the course of the argument it came out, and was admitted by the counsel for Plaintiff, that the bill contained no prayer of injunction; which, though inserted in the draught of the bill, and in the briefs, was omitted in the ingrossment. Upon that every thing relative to the waste and injunction was laid out of the case. The bill stated, that *Crispin Pinchin* seised in fee in 1708, previously to his marriage, made a settlement upon himself for life, then upon his intended wife for life, then for 120 years upon trusts, which never took effect, then to his first and every other son in tail, then to the daughters in the same manner, remainder to his own right heirs. The only issue of this marriage was one daughter, *Elizabeth Pinchin*. In 1709 he devised " *the land of Westry in Devonshire to my cousin William Pinchin if my daughter die without heirs.*" Upon his death a few days after the date of the will the daughter entered, and continued in possession, till she died, leaving *William Pinchin* her heir at law, who entered and continued in possession till 1765, when he died, leaving only one daughter *Mary*, married to Defendant *Cole*; who, having had a child by her, though there was no issue at her death, became tenant by the curtesy. He continued in possession till 1767; when being threatened with law-suits by the Defendants *Finny* and *Kellon*, who had got possession of the title-deeds as executors of *Elizabeth Finny*, mother of the Defendant, and set up a pretended title either from *Elizabeth Pinchin* the mother, or *Elizabeth* the daughter, he entered into some agreement with them, by which they were admitted into possession. *Elizabeth Pinchin* the mother had no title to convey, being only tenant for life; and the will of the daughter ought to be proved; because she was not of sound mind, when she made it. Defendant *Peering* claims under *Finny* and *Kellon* as a purchaser; but he is so at an undervalue with notice of all these transactions, and was the attorney concerned. Plaintiffs claim either as heirs of the devisee; or of the testator, supposing the devise not good; being co-heirs at law of *Mary* daughter and heir at law of the devisee; *Ford* being grand-son and heir of *Joanna*, one of the sisters of testator, and *Elizabeth Hughes* being granddaughter and heiress of *Alice* his other sister. In *Devonshire* according to the provincial dialect the term "*cousin*" is used to

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to denote a nephew; and the term "*land*" to signify the whole interest, which is there scarcely ever known among people of low degree by any other expression. Plaintiffs are advised, that testator intended to devise his whole interest in those lands to *William Pinchin*, who was in fact his nephew and not his cousin. Plaintiffs cannot claim at law during the life of the tenant by the curtesy. To the bill, stating these circumstances, *Peering* demurred generally; the rest disclaimed.

Mr. *Simeon*, for the Demurrer.

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There can be no objection, that the demurrer covers too much for all the discovery and relief prayed depend on the \* title. The first objection is, that if Plaintiffs have title, it is not stated so, that the Court can see it; and as the Court cannot proceed, unless the fact appears upon the record, Defendant can demur in that case. A demurrer is more essentially necessary in this case, than any other; for as part of the bill is for discovery, unless Defendant can demur, he must make that discovery. In a real action no damage can happen to Defendant; for when they come to trial, they may supply the statement by proof, without which they cannot proceed; but here it must be taken to be true, for it cannot be pleaded to. In *Prior v. Gun*, 16th December, 1785, and *Wallace v. Newman*, 2 Bro. Ch. Ca. 143, Plaintiff came for discovery and relief; Defendant pleaded negatively, that Plaintiff was not heir at law; and *your Lordship* over-ruled the plea upon full consideration of those cases. Neither can this be resisted by answer. Therefore demurrer is the only mode of preventing the necessity of making this discovery. One ground of the demurrer is, that the links of the chain of their pedigree are not stated; for they call themselves heirs; but the Court cannot upon the record see, that they are so. Their title is so ambiguously stated, that it is very hard to answer it: in one part they claim under the will; in another, as heirs at law. I must take it to be this, "*we claim from the devisee under the will; but if not successful in that, then from the testator as heirs,*" so in the alternative, either, under the devise or by descent. To draw the conclusion, that they are grandchildren and heirs, will not do; for it is a conclusion of law, which ought to appear. They ought to shew, how they are so.  
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So where they state themselves to be heirs to the devisee, they ought to show how; and to state negatively, that there was no brother, and that these were the only two sisters; for there might be more; and if so, they would all have taken as coparceners, and then it would not be true, that the Plaintiffs are co-heirs of the devisee. But supposing the title sufficiently stated, it will then depend on the will. The averments are stated to prove, that by the words of the will *William Pinchin* took the inheritance, insisting, that under these particular circumstances, though in general the word "*land*" would not carry the fee, yet this is to be so taken. But there is no case, where this has ever been done upon an averment of collateral circumstances, and suggestion of an expression. *Cheney's Case*, 5 *Coke*, 68, is the leading case, upon which all the rest are founded. There it was resolved, that in a devise of land in an averment out of the will shall not be received, on account of the inconvenience that would follow; for no one would know by the written words what construction to make, if it might be controuled by collateral averments out of the will. No such averments can be allowed here; for here is neither latent nor patent ambiguity according to Lord *Bacon's* distinction; for the word "*land*" has a definite meaning: and they cannot supply words of inheritance by averment of a local usage.

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*Mr. Mitford* and *Mr. Richards*, for Plaintiffs.

It is not usual to state a title more fully. Even in real actions it is not necessary to state all the links of the chain; but the several descents are sufficient, and are sufficiently set forth here. The question came before your Lordship in *Mans v. Hollingsworth*; where the Defendant demurred, because the title was not sufficiently set forth; but your Lordship thought, it was sufficient, though much more loose than this. The averments are proper and necessary. Without them upon the face of the will only an estate for life would pass by the word "*land*;" therefore to substantiate the claim it is impossible not to introduce them. Besides, being admitted to be true, as they necessarily are by the demurrer, which admits every fact in the bill, they are sufficient to induce the Court to think the devise sufficient to cast the estate.

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estate. We are entitled to give evidence. Suppose a foreign language contained in the will, evidence would be admitted to shew the meaning of the words. Here he makes use of a word perfectly in use in that country in a particular sense. But by demurring they admit the suggestion, and the Court will not against their own confession take it to be otherwise. The Court acts upon a confession in an answer. The admissions supersede the necessity of proof; for suppose they had been made by answer, if Plaintiff had then proceeded to proof, his depositions would have been considered impertinent. It is not, like *Cheney's Case*, explaining the intention by an averment; but it is explaining the testator's language by that of the country.

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They have only stated generally the entry into possession of *Elizabeth* the daughter, not that she died seized, which is absolutely necessary; for she might have disposed of it; they do not say, she did not. It is said, defendant is prejudiced by the legal * inference of the demurrer; and that it necessarily admits every conclusion of law as well as the facts: but it has never been contended, since the case in Lord *Raym.* 18, that any thing but the mere fact is admitted by the demurrer. Supposing the suggestion, made by the averment, true; it cannot be taken into consideration. The rule of law, established by *Cheney's Case*, and others, prevents the application of that fact. But the averment is only, that they *are advised*, the word has that meaning among persons of *low degree*; and supposing Defendant bound, it is only to the admission of the facts as stated; nor do they know the degree of these persons.

Lord CHANCELLOR.

How far has the Court gone upon the simple ground of tenants for life to compel them to deliver up deeds, and upon what allegations? Suppose *Cole* to be in possession.

For Plaintiff.

Even against him Plaintiff would have a right to the production. The Court has frequently ordered it.

Lord CHANCELLOR.

In what case? Suppose it had been a devise to the daughter for life, remainder to another; could I take the deeds out of her possession? There is a case of a jointress, where it may be done, upon her jointure being confirmed (43). *Primâ facie* the deeds are property in the custody of tenant for life (44).

For Plaintiff.

I conceived it so common to take deeds out of the possession of tenant for life, that I did not think, a case would be required. In *Tyler v. Skinner* a lady tenant for life under a settlement parted with the title-deeds to those who claimed, as heirs at law; others, claiming also as heirs, filed a bill to have them produced and deposited. Though this case is not decided, an issue having been directed, and a new trial granted, yet it is decided to this extent, that the Court will entertain a bill for this purpose. Where the deeds are in the hands of tenant for * life under a settlement, the Court will not take them from him without cause.

For Defendant.

In *Hicks v. Hicks*, 7th June, 1785, at the Rolls, the late *Master of the Rolls* refused it. That case is not directly in point. The bill was by tenant for life against the remainder-man to have deeds delivered up, which were in the Master's office. Mr. *Maddocks* for Plaintiff produced an order by Lord *Nottingham*, by which it was done; but as the deeds were in the Master's office, where they were safe, upon that account Lord *Kenyon*, then *Master of the Rolls*, would not order them to

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Primâ facie title-deeds are property in the custody of tenant for life. May be taken from a jointress upon her jointure being confirmed.

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(43) 2 *Ves.* 450. Without such offer the settlement may be pleaded in bar; 1 *Atk.* 52. She is not obliged to discover upon the offer to confirm; but may wait till the act done; *Leech v. Trollop*, 2 *Ves.* 662. In *Aston v. Aston*, 4th October, 1747, the decree, reciting the offer of the

Plaintiff to confirm the jointure of Defendant Lady *Aston*, directed, that after such jointure shall be confirmed, as aforesaid, she shall produce all deeds, &c. Mr. *Deaves's MSS.*

(44) *Post*, Vol. III, 224. *Duncombe v. Mayer*, VIII, 320. 1 *Sch. & Lef.* 223.

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to be delivered up (45). It stood over in order to look into the cases, and I do not know the event. But here it appears, they have no title; for there is a life estate outstanding. I have two manuscript cases; *Ivy v. Ivy*, and *Lord Leominster v. Lord Pomfret*, 24th November, 1752; where a son next remainder-man after a father's estate for life, liable to waste, filed a bill to have the title-deeds produced, and suggested waste, which was denied: the bill was dismissed (46).

*Lord CHANCELLOR.*

*Tyler v. Skinner* is no authority, not being yet decided. Though the Counsel thinks it so much of course to compel tenant for life to deliver up the title-deeds, I shall look into the cases upon that (47). But the simple question here is, whether, having got possession of the title-deeds as personal representatives of *Elizabeth Finny*, and having no claim themselves, they are not obliged to produce them. If so, this Court would not confine Plaintiffs to state their title *modo et formâ*; at least not without giving them the assistance of this production. I think, the demurrer must be over-ruled. I agree with the Counsel for Defendant, that the demurrer admits all those

(45) See *Duncombe v. Mayer*, post, Vol. VIII, 320; where it was done upon precedents on application of the trustees and tenant for life.

(46) Since reported, *Amb.* 154.

(47) Not done, where Plaintiff's interest is too remote: but it is the common practice in case of a remainder-man expectant upon a mere tenancy for life; 1 *Atk.* 431. In *Southby v. Stonehouse*, 2 *Ves.* 612, Lord *Hardwicke* says, it is the ordinary relief of remainder-man or reversioner to have the title-deeds taken care of against the tenant for life; and the bill was dis-

missed, because Plaintiff, having no title to the reversion, could have none to the deeds; *ibid.* 617. Defendant not obliged to discover title-deeds: *Baden v. Dore*, 2 *Ves.* 445. Heir at law, as against devisees, has no equity except to remove incumbrances in the way of his legal right; but cannot call for an inspection of deeds in the possession of devisees. Heir in tail entitled to inspection of all deeds of settlement, admitted to be in possession of Defendants, creating estates in tail general; but no farther. *Lady Shaftesbury v. Arrowsmith*, post, Vol. IV, 66.



those facts only, that are well pleaded; and the facts alone without the conclusion of law. I know, the expression of "*land*" to signify the whole interest is very frequent. But I think, the demurrer must be over-ruled upon the other ground. What I go upon, is this: tenant for life has not the title-deeds; but he is charged with having delivered up possession under a notion of being afraid of a law-suit by those, who had no right, but as personal representatives of this woman had got possession of the deeds: and where tenant for life is satisfied, and does not care about the title, but remainder-man is not satisfied, the question is, whether the title-deeds shall be left, where they are, to the prejudice of the remainder-man. I think, the Court must take some care for the security of the title-deeds. Let the demurrer be over-ruled.

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*Lord Chancellor* said, he would look at the manuscript cases cited for Defendant; and, if he should change his opinion, would mention it again; but it never was mentioned again.

the hands of third persons, who have no right, to prejudice of remainder-man.

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Demurrer admits only facts well pleaded; and the facts alone, without the conclusion of law.

Where tenant for life is satisfied, and does not care about the title, but remainder-man is not, Court will take care of the deeds, and not leave them in

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LEE v. ALSTON.

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*Dec. 15th.*

**M***R**S.* *LEE*, the Plaintiff, was entitled under the will of *Sir Thomas Alston* to the remainder in fee of an estate, of which the Defendant *Sir Rowland Alston* was tenant for life punishable for waste, under a settlement made by *Sir Thomas* in 1750, by which the last remainder was reserved to himself in fee. Plaintiff brought the bill for an account of timber cut down by the Defendant, and for an injunction. Defendant by answer admitted having cut the timber, as charged in the bill; but set up a defence as to part to the value of 192*l.*; as having been employed in repairing, by rebuilding, and otherwise; the remainder he had sold for 665*l.* 7*s.*; for which he claimed not to be accountable, as the lands, from which the timber had been cut, were lands allotted under an inclosing act in

3 *Bro. C.C.* 37. Tenant for life, punishable for waste, with power under an inclosing act to mortgage for the expence of the inclosure, sold timber, and applied the produce instead: decreed to account to owner of next estate of inheritance.

1776, owner of next estate of inheritance.



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1776, which gave the former owner of any lands, so allotted, liberty within six months to fell any trees, growing on them, for his own use and benefit. It also gave any tenant for life of the lands inclosed a right to charge by way of mortgage upon them a sum, according to the expence, not exceeding forty shillings an acre, to be paid to the commissioners for the purpose of effecting the inclosure; the interest of which sum was directed to be kept down by tenant for life during his life. Defendant by answer insisted, that under this clause he had a right to charge to the amount of 2500*l.*; and therefore claimed not to be accountable for this sum of 665*l.* 7*s.* which he had applied according to the act. An account was decreed (48); and the Master's report confirmed the answer as to the sum employed in repairs, the sum for which the rest sold, and his right to charge 2500*l.* by way of mortgage. The cause came on for farther direction as to this sum of 665*l.* 7*s.* interest, and costs.

*Mr. Mansfield and Lloyd, for Plaintiff.*

If he had charged by mortgage, he must have kept down the interest during his life. Plaintiff as the first person having an estate of inheritance is entitled to this sum, which is the produce of the timber, exclusively of what was applied in repairs; and to interest from the several times of felling it, and costs. When the account was decreed, your Lordship thought Plaintiff entitled, and that Defendant had no right; because the act of parliament only gave him a right to borrow upon mortgage, of which he must have kept down the interest. There is nothing authorizing tenant for life to cut down timber. If Plaintiff is entitled to this sum, she might have made interest of it. The right to the timber when cut down is in those, who are entitled to the first estate of inheritance, at the time it is severed. *Whitfield v. Bewit*, 2 *P. Will.* 240; 3 *P. Will.* 267; *Garth v. Cotton*, 1 *Ves.* 524, 546; *Udal v. Udal*, *Aleyn*, 81; *Orde v. Duke of Bolton*, before your Lordship, 24th *February*, 1784 (49). *Whitfield v. Bewit* has always been followed since; by Lord *Hardwicke* in *Garth v. Cotton*;

(48) 1 *Bro. Ch. Ca.* 194.

*Williams v. The Duke of Bolton*,

(49) Reported under the title 1 *Cox*, 72.

*Cotton*; in which he proceeded upon fraud between tenant for life and the next owner of inheritance; and by your Lordship in *Orde v. Duke of Bolton*; in which the Duke being tenant for life had also the first estate of inheritance in himself: he cut the timber; and, if the ordinary rule had taken place, would have made advantage of his own \* wrong. Your Lordship upon that ground held, that Mr. *Orde*'s son should take ( 50 ).

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*Lord CHANCELLOR.*

I believe it did turn upon that.

For Plaintiff.

One parcel to the amount of 116*l.* is stated to have been cut from the orchard; he could have no right to cut from the orchard for the purpose of inclosing. Defendant has had the advantage of this sum from the years 1765, 1766, and 1767 respectively; therefore there should be interest, and costs, as the Court has decided, that there was no colour for the defence.

*Solicitor General, Mr. Selwyn, and Mr. Richards, for Defendant.*

The Court never discovered more reluctance to decree for Plaintiff than in the present case. The answer admitted, that Defendant had cut the timber according to the charges in the bill. When it came on as a case of a Plaintiff having a clear legal remainder, your *Lordship* with great reluctance decreed an account upon this principle, that the admission of having wrongfully cut down timber gave a right to an account; and Plaintiff was not bound to believe, that no more had been cut, than was confessed. But no more is found by the Master, than was contained in the answer. This case, in which Plaintiff, not content with the answer, creates such an expence, is not fit

(50) It was ordered to be paid death of the Duke, not having into Court; Mr. *Orde*'s son not had a son, the fund was decreed being entitled, as the Duke might to be laid out in land, to be have a son. 3 *P. Will.* 4th edit. settled upon the original uses. 268, n. *Williams v. The Duke Post, Powlett v. The Duchess of Bolton*, 1 *Cox*, 72. After the *Bolton*, Vol. III, 374.

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fit for costs. Besides, Plaintiff is much benefited by this mistake. Defendant had a right to charge this land to the amount of the actual expence, not exceeding forty shillings an acre.

Lord CHANCELLOR.

The right given by the act is to raise by mortgage and pay the sum appointed, not exceeding the proportion, to the Commissioners for the purpose of effecting the inclosure.

For Defendant.

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He did pay it, as directed by the act. The sum appointed was 2500*l.*; but, says he, " I have cut down timber to the " amount of such a sum; therefore the mortgage shall be only " *for the difference." The difficulty arises from the framer of the act not having adverted to this case; that the owner of the land and of the property in the timber might be different persons; and the owner of the property might not have a right to enter within six months. Plaintiff ought not to have relief, unless she will consent, that her inheritance shall be charged to the extent, to which Defendant has a right to charge it; which will be doing equity, while she receives it. Immediately upon the answer coming in Plaintiff knew, what had been cut; and, as it was severed, might have had complete relief at law by an action. I admit, they were not obliged to take that remedy, because it is the practice to decree an account upon the admission, that any timber has been wrongfully cut; but if they go to account, and get no farther discovery they cannot have costs. If this was the ordinary case, they could have no costs beyond the decree, because it might have been set down upon bill and answer. The account was at Plaintiff's risk, and the inquiry was useless. Under these circumstances in this Court, where costs are discretionary, none will be given since the hearing of the cause. Consider the advantage Plaintiff has by this act of Defendant. If he had refrained from cutting it, she would not have had it; for after the expiration of the time given by the act it would have belonged to the person, to whom the land was allotted.

For Plaintiff.

That is a new question.

For Defendant.

Besides, when Plaintiff comes to the estate, it will be of more value, from what has been cut. The money was applied under an honest mistake; and if Plaintiff gets the principal alone, she will have the full value.

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Lord CHANCELLOR.

In *Whitfield v. Bewit* the Court seemed to hold, that the legal right to the timber, being in a remainder-man, might be pursued here. I have no doubt, an action of *trover* might be maintained. What I meant, when the cause came on before, was this. Suppose they come for a discovery and an account, and that a discovery is made accordingly; I should agree Plaintiff ought to be satisfied with it: but the admission, * that some has been wrongfully cut, gives them a right to an account of that. The wonder, I have, is, how they can raise a charge to the amount of forty shillings an acre. It is a monstrous allowance for an inclosure, which must be *ad libitum*; for a pleasure ground, park, &c. might make a man go into a number of unwarrantable expences. The mortgage must stand by itself, and so must the money: He had no right to apply this timber to the purposes of the mortgage. But I do not believe, Plaintiff can have costs; for the act is very obscurely drawn; and she has a great advantage in consequence of this mistake, by which this sum is taken out of the fire for her. My present opinion is, that if any timber has been cut from the estate, where there was no right to cut any, that circumstance gives a right to the account. If you can make out, that Plaintiff has no right to come here, but ought to be left to law, I will turn round her bill, because she has not brought an action: but I thought, the circumstance of timber having been wrongfully cut down entitled her to the account; as in the case of a bailiff: if a man enters upon another's lands, and makes money of his property, he will be considered as a bailiff, and must account; and here they must take the money, he has got for it, though in an action they would go for the value of the timber: for those, who come into Equity, must take the account, as it lies; unless there is some special case to vary the terms of it. Here Defendant has made

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Admission

that any timber has been wrongfully cut gives a right to an account. Inclosure under an inclosing act must not be *ad libitum*.

In Equity the account must be taken, as it lies; unless some special

case; though at law the value would be recovered.

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 Costs refused.

himself bailiff to Plaintiff; and therefore must pay her this principal sum. But I cannot give costs; nor am I inclined to give interest. It is a hard demand; though not such, as I can lay a hand upon in a Court of Equity. Plaintiff gets a great deal by this accident. Take these terms, and I believe, they will be agreed to: no interest, unless they will undertake to make no further charge. They must confirm the mortgage.

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The Counsel for Defendant consented to the terms (51).

(51) *Gower v. Eyre*, Coop. 156.

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PITT v. LORD CAMELFORD.

Question of intention to be determined by the Court, but not proper for the Master.

AFTER a devise of real and personal estate a codicil contained a bequest in these words, "Item, all my navy bills amounting to about 7000*l*." It was referred to inquire, what testator possessed in navy bills; which the Master reported to amount to 12,000*l*. Afterwards on examining the banker's books it appeared, that the navy bills really amounted to but 7029*l*.: and that the remainder of the 12,000*l*. consisted in victualling bills. All the devisees were infants. The cause came on for farther directions.

*Attorney General* for the eldest devisee, tenant in tail of the real estate.

It must go back to the Master to review his report. Navy bills and victualling bills are quite distinct, though equal securities. The latter could not be intended to pass under this bequest. It is observable, that the amount of the navy bill just answers to the sum mentioned by testator as their amount. It is the interest of the younger branches of the family, that this bequest should comprehend as much as possible; but of the eldest, that it should comprise as little; for what is not comprised in it, goes to his estate. The devisees of the navy bills wish at the same time to refer a question, whether testator did not mean to include victualling bills under the term "*navy bills*." I have no objection.

*Lord CHANCELLOR.*

It would not be a very wise reference to make. It is not a proper question for the Master; but ought to be determined by the Court.

1789.  
PITT  
v.  
Lord  
CAMELFORD.

*Mr. Graham.*

I recollect a case between Lord *John Cavendish* and some of the *Cavendish* family upon the will of Mrs. *Cavendish*, by which she bequeathed her cabinet, with her gems, precious stones, and other cabinet curiosities; and I think, it was \* referred to inquire, whether some set jewels of considerable value, which were found in the cabinet, were comprised under the term "*precious stones*." Your Lordship determined, they were not; and, I believe, upon the report.

[ \*84 ]

*Mr. Mitford* said, he believed, the reference in that case was to inquire whether they had been commonly worn by the testatrix.

*Mr. Mansfield*, for devisee of the navy bills.

Navy bills and victualling bills are considered as so nearly the same, that a broker would as soon lay out money upon one as the other. They are equal in point of security. The testator only guessed at the amount of his navy bills, which he could not possibly have known; for the broker acts not under any particular directions as to investing money in those securities, but under general directions.

*Lord CHANCELLOR.*

Perhaps it may be indifferent to a broker, in which of these securities he should lay out his money: but that will not make them the same. They no otherwise resemble each other than in being equally secure; for Government makes no difference in the payment of its securities. But they are totally different with respect to this will. As to the case cited, perhaps the reference was upon the ground mentioned by Mr. *Mitford*: but if it was, as Mr. *Graham* says, who is apt to be accurate, it was not a wise order to make, nor will I follow it now. Let the parties state before the Master any circumstances, they may think material; and, if they can make out any case, I will hear

1789.  
 ~~~~~  
 PITT
 v.
 Lord
 CAMELFORD.

hear it; but I will not send it to the Master to inquire, whether navy bills mean victualling bills. Take the order for the Master to review his report as to the navy bills, and to inquire into their amount; and in so doing let them state any circumstances, they may think material.

[85]

FLETCHER v. DODD.

1789.

Dec. 15th.

Lord CHANCELLOR.

Receiver must pay in his money yearly, and must pay nothing out without an order. He shall pay interest for money kept in his hands even a quarter of a year after it ought to have been paid in. Inquiry directed as to that, though he had passed his accounts, and all parties declared themselves satisfied.

I WILL make a receiver pay interest, if he keeps money in his hands a quarter of a year, after it ought to have been paid into Court. This is a shameful business as to the infants in this cause; which has been twelve years in this Court though it might have been decided in half a year, through the inattention of the prosecutor for the infants. The receiver must pay the interest, and the costs of this reference, if any found and he is well off in not paying more. Let the Master compute, what money was in his hands at the time, it ought to have been paid into Court; and compute interest from that time at the rate of 4 *per cent.* and reserve consideration of the costs of the inquiry, till after it has been made (52).

On the 3d of *June*, 1790, the receiver petitioned to have an allowance made him of 1300*l.* in respect of a mortgage, he had paid off, and that he might be considered as trustee for the parties entitled. He had passed his accounts before the Master; and all the parties declared themselves satisfied with his conduct.

Lord CHANCELLOR.

Notwithstanding he has passed his accounts before the Master, let the Master inquire, what money he has received from time to time, and how long he has kept it in his hands. He comes to have his accounts made up without shewing that. Though the parties are satisfied, I will make them more so if I find, he has kept money in his hands longer, than he ought

(52) Post, ——— v. *Jolland*, Vol. VIII, 72. *Potts v. Leighton* XV, 273, and the General Order of 1796, Appendix to Vol. XIX

ought. A receiver has a very plain course to follow, if he pleases: he has only to pay in his money yearly; and to pay nothing out without an order of Court (53).

1789.
FLETCHER
v.
DODD.

(53) Post, *Morris v. Elme*, out money on the estate without
139. *Blunt v. Clitherow*, Post, a previous order: and the present
Vol. VI, 799. As to the com- practice is to direct an inquiry,
mittee of a lunatic, *Anon.* X. 104. whether the transaction is for
Ex parte Marton & Hilbert, XI, the benefit of the parties inte-
397. *Ex parte Hall*, 1 Jac. 160: rested: *Attorney-General v. Vi-*
but this strictness has been re- gor, XI, 563. XV, 26. *Tempest*
laxed as to a receiver, having laid v. *Ord*, 2 Mer. 55.

HALES v. SHAFTOE.

[86]

MASTER of the ROLLS for the Lord CHANCELLOR.

1790.
Jan. 23d.

DEFENDANT was in contempt for want of appearance; and a sequestration issued; under which possession had been taken of great part of his personal property, consisting of the furniture of his houses. Upon motion for an order on the sequestrators to sell, the Master of the Rolls expressed a doubt, whether any sale could be directed farther than to pay the expences,

Quære, whether there can be any sale of goods, taken under a sequestration upon mesne process, farther than to pay the expences.

Solicitor General, for the motion,

Defendant is a man of large fortune, and obstinately stands out in contempt. If this is not done, Plaintiff cannot get on. The sequestrators have been in possession near a year, the sequestration having issued last *Hilary* term; and he has never appeared; nor does he now. I cannot find any order of this kind: but the books say, the party must apply to the Court to have the goods sold according to the discretion of the Court. The distinction is, that the sequestrators can only take possession; but the Court, considering it as in nature of a distress infinite, will dispose of the property according to the exigency and justice of the case; and order such farther disposition, as will make it effectual.

1790.

HALES
v.
SHAFTOE.

MASTER of the ROLLS.

[*87]

If such an order can be made, the motion must be for a certain part; there must be some limits to it; and the Court would decide; but would not order the whole of the property to be sold. But this is upon mesne process to bring him in; the intention of which process is merely to keep him out of possession. The object of the motion goes beyond what was intended for. The *Register* thinks, that it ought to be confined to paying them their expence. I doubt, whether upon mesne process I can go farther than keeping him out of possession; but he must be really out of possession, and not nominally. However I wish, you would stand to see, if he will not comply. I remember, he did stand before, after having stood out for some time, put in an answer upon consideration: and I should hope, that a man of fortune, when he comes to consider seriously of it, will not stand out any longer. This Court must not be trifled with; its process must be made effectual (54).

(54) The same motion refused by the *Lord Chancellor*. 3 Bro. C. C. 72. 2 Cox, 224, and again upon the 29th of July, 1790. The *Lord Chancellor* said, sequestrations could not upon mesne process sell for any other purpose than to raise the costs of the contempt, if the Defendant would not pay them; and that it was so laid down in *Gibson v. Scovington*, 1 Vern. 247. *Heyn v. Heyn*, 1 Jac. 49. But 1 Ves. 184, *Hardwicke* said, that the Court now, in aid of its process, orders goods, taken under sequestration for a collateral use in proceedings before a Court, to be sold; though not immediately. Post, *Shaw v. Simmonds*, Vol. III, 22. *Simmonds v. Kinnaird*, IV, 735. *Kinnaird v. Young*, 2 Ves. & Bea. 184. *Young v. Bell*, 2 Mad. 21. In *lyn v. Colhoun*, 3 Swans several authorities on the subject of sequestrations are collected.

KNOX v. SYMMONDS.

1790.

Jan. 23d.

Second answer may be put in pending exceptions to the first.

The MASTER of the ROLLS for the Lord CHANCELLOR. SEVERAL exceptions were taken to the answer, and proceeded on before the Master till the 21st December. Plaintiff endeavoured to prove by affidavit, that on that

Counsel being prevented from attending, before the office shut, there was a parol agreement to defer arguing the rest till after the Holidays. In the mean time Defendant put in a full answer; upon which he obtained the usual order to dissolve an injunction from proceeding at law, which had been granted. Motion to discharge that order, either as obtained against practice, or upon the footing of the agreement.

1790.

KNOX
v.

SYMMONDS.

Solicitor General, Mr. Mansfield, and Mr. Hollist, for the motion.

I do not state this to be against practice with confidence; as the *Registers* (55) differ upon it; but, supposing it regular, this agreement will prevent it from being good. I agree, that if Defendant had submitted to the exceptions, though he had put in the answer the moment afterwards, it would have been sufficient; but by this agreement letting it be understood, that he did not submit, but meant to proceed in arguing the exceptions, he prevented Plaintiff from moving to amend his bill at the last seal before Christmas; and thereby deprived him of the * common indulgence given to every Plaintiff of amending his bill, where there is an insufficient answer; which would have been done, had Defendant's intention been known. As Defendant had submitted to the exceptions, the answer must now be considered insufficient.

[*88]

Mr. Richards, contra.

The practice is with Defendant. No case is produced against this. It was done in the case of *Sir Watkins Williams Wynne v. Owen*, bailiff of his coal mines: An action was brought, bill filed, and exceptions taken to the answer; which went to be argued: in the mean time a farther answer was prepared, which I signed; and the second answer was put in pending the exceptions to the first.

MASTER of the ROLLS.

My opinion is with Defendant. The single question seems to be as to the point of practice; for there is no special agreement made out by the affidavit; but merely that the parties understood, that the exceptions were to be proceeded on. There

(55) *Mr. Dickens and Mr. Green.*

1790.

KNOX
v.

SYMMONDS.
Second answer
may be filed at
any time be-
fore the order
to amend, &c.
even the mo-
ment excep-
tions are
taken.

There is no particular undertaking to that purpose by Defendant; it does not impute to him any breach of faith. The single question therefore is, whether the Court permits the party to put in an answer pending exceptions before the Master, or whether it has been held irregular. I always conceived, the party might, the moment exceptions were taken, prepare and put in a better answer. He may do it at any time before the order to amend the bill, and that Defendant may answer amendments and exceptions together; and when the order is moved for, that he has done so, will be a sufficient answer (56). If the practice is, that he may put it in at any time before the order, he might have had it ready, and have filed it, as soon as he heard, the Master's opinion was against him on the exceptions; even before the report; and then there is nothing supposing, that he waited till after the last session before Christmas to do it. It is a kind of race to be run between Plaintiff and Defendant. If the practice is wrong, it ought to be altered by determining, that the exceptions shall not be answered, till Plaintiff shall have an opportunity of amending his bill; but that is not for me to determine. The *Register* says, this point was determined by Sir *Thomas Clarke* and that the Court permitted the race. I think it is regular and the affidavit has made no difference. *If it could be brought to a breach of faith, it would do; otherwise the only conclusion is, that the Defendant has won. Nor do I think Plaintiff is prejudiced by this practice; this is an injunction bill; and he is only in the situation, in which he would have been, if the full answer had come in at first.

[*89]

(56) Post, Vol. XI, 578.



1790.

Jan. 28th.

v. BENNET.

BULLER, J. for the LORD CHANCELLOR.

Estate ordered to be sold for debts; money raised under sequestration, paid into Court, though contempt cleared.

A SEQUESTRATION had issued against Defendant *Mrs. Bennet*; under which the sequestrators had levied 600*l.* from the rents and profits of an estate; which sum they moved to bring into Court upon their separate account for their indemnity.

Mr. Cooke, for Defendant,
Insisted, that as Defendant had cleared her contempt, the money levied ought to be paid to her.

1790.
~~~~~  
v.  
**BENNET.**

The Court granted the motion, as it appeared, the estate was ordered to be sold for payment of debts, and therefore was liable to creditors in the first instance.



**HILLIARD**, (In the Bankruptcy of.)

1790.  
*Feb. 5th.*

**THE** bankruptcy happened in 1777. The assignees had received two sums 1100*l.* and 192*l.*; but never made a dividend.

\*Petition by the creditors for an order on the assignees to pay dividends in respect of the sums received from the bankrupt's effects, with interest at 5 *per cent.*

Interest at 4 *per cent.* against assignees of bankrupt for not making a dividend, when they ought, will be increased upon circumstances.  
[ \*90 ]

**Mr. Mansfield**, for the Petition.

The assignees pretend, they were prevented by some injunction from this Court: but they have had the use of this money all this time; therefore ought to pay 5 *per cent.*

**Solicitor General**, for the Assignees.

This demand with interest at 4 *per cent.* cannot be resisted; as certainly they were not paid, when they ought to have been paid. The assignees have made no advantage of the money; for it has lain at their banker's the whole time with their own money: and though your Lordship has never considered that as an excuse; yet there is no reason, why they should pay more than 4 *per cent.* The reason for not making a dividend was a bill filed by a person, having some claim on the estate of the bankrupt, for an injunction from making a dividend; and they were told by that claimant's attorney, that the injunction was granted.

**Lord CHANCELLOR.**

The usual interest is 4 *per cent.*; but if the petitioners can make out any case to shew, that the assignees have made more by it, that would be a good ground for increasing it. But the

1790.

HILLIARD,  
(In the  
Bankruptcy  
of.)

If it is necessary for A. to keep money at his banker's, and he uses B.'s money for that, it is making advantage of it.

[ 91 ]

the question is, whether it will be worth your while to go into that inquiry for the additional 1 *per cent.* I do not quite agree with the *Solicitor General*, that it is to be concluded, that no advantage was made of the money, because it was permitted to lie at his banker's; for if it is necessary for a man to keep a sum of money at his banker's, and he makes use of his constituent's money for that purpose, he does make advantage of it (57).

Mr. *Mansfield* gave up the point.

Upon some dispute concerning the amount of sums, upon which, and the periods from which, interest was to accrue;

Lord CHANCELLOR.

If you cannot agree upon these facts, I must send it to an inquiry; if you can, I will make the order at once, which will be the shortest and least expensive mode; let it stand to the next day of petitions for that purpose.

(57) *Treves v. Townshend*, 1 compound interest. By statute Bro. C. C. 384; 1 *Cooke's B. L.* 6 Geo. IV. c. 16. s. 104, Commissioners of Bankruptcy are required to charge assignees with interest at the rate of 20*L per* 197. See post, 169. *Hankey v.* commissioners of Bankruptcy are required to charge assignees with *Garratt*, 236. *Younge v. Combe*, interest at the rate of 20*L per* *Piety v. Stace*, Vol. IV, 101, 620. cent. for all sums, part of the *Pocock v. Reddington*, V. 794. bankrupt's estate, retained or *Ex parte Vernon*, XIII, 270. *Ex* employed for their own benefit, *parte Townshend*, XV, 470, and or knowingly permitted to be so the note, post, 99, *Waring v. Cun-* retained, &c. by a co-assignee. *liffe*, on the distinction as to the

1790.

Feb. 10th.

To put party to election to sue at Law or in Equity is motion of course.

ANONYMOUS.

SPECIAL motion to put Defendant to election to sue at Law or in Equity.

Lord CHANCELLOR.

You may always put a Defendant to his election. There can be but one order about it. It is a motion of course; and you need not have given notice of it (58).

(58) See *Boyd v. Heinzelman*, 1 *Ves. & Bea.* 281. *Mills v. Fry*, 3 *Ves. & Bea.* 9. *Hogue v. Curtis*, 1 *Jac. & Walk.* 449.

SCULTHORP v. BURGESS.

1790.

Feb. 11th.

**JAMES SCULTHORP** by will gave 700*l.* stock to his wife for life, remainder to the children; if none, according to the appointment of the wife by deed or will. In a bill against the executors Plaintiff claimed as the wife's assignee by deed of the whole interest in this stock, upon the death of an only child, born after its father's death, and which the bill stated to have died a few days after its birth. The assignment included the wife's life interest; but she joined in the bill for dividends received by the executors previously to the assignment. In a former bill it had been stated, that there never was a child: that bill was dismissed.

Devisee of stock for life, with absolute power of appointment, if no children; referred to the Master for inquiry about a child upon the grounds for suspicion.

*Solicitor General*, for Defendant, was desired to begin:

[ 92 ]

An inquiry concerning this child will be proper, upon the ground there is for suspicion. From the evidence concerning the child's death it appears to have lived about two months. The evidence itself is suspicious: one person swears, to his belief only, that she was delivered of a child in his father's house, and that he believes the child, that died, was the same; but only swears positively to his having seen the dead child; which is remarkable. The only other evidence is that of the nurse, to whom it was delivered. It will be proper therefore to refer it to the Master to inquire, when this child was born, and what became of it.

*Mr. Mansfield* and *Mr. Johnson*, for Plaintiffs.

The executors received the dividends. One of them is a bankrupt; Plaintiff came in under the commission; and there was a very small dividend. The statement in the first bill was a mere mistake of her Solicitor; as soon as it was found out, she dismissed her own bill with costs.

For Defendant.

It was not till after answer.

*Lord CHANCELLOR.*

It is a very odd mistake. We must suppose, her Solicitor acted by her instructions; and this mistake was in the most

1790.

SCULTHORP

v.

BURGESS.

Resulting trust  
for grantor in  
a deed, where  
the considera-  
tion is only five  
shillings.

[ \* 93 ]

material point; for till it was ascertained, whether there was a child, or not, nothing could be done. But it does not now seem to be much disputed, that there was a child; and if she had not made that different statement in the first bill, I should have thought, this was pretty much the sort of evidence adduced to prove things of this kind. One person swears to the delivery of the woman, another to her having received the child to nurse. It seems to be the interest of Plaintiffs to say, there was no child; for then she has the absolute disposal of it. The deed is only in consideration of five shillings (59), from which arises a resulting trust to herself; which shews, that it is only calculated to raise the point immediately, before she had occasion for it to make an appointment either by deed or will. Upon these grounds the inquiry is proper; I do not \*expect much effect from it; but under the circumstances it is a proper precaution for the Court to take.

(59) 1 *Atk.* 94.

1790.

*Feb. 11th.*

Order made to  
prevent re-  
moval of tim-  
ber wrong-  
fully cut.

ANONYMOUS.

**SOLICITOR GENERAL** moved for an order to prevent the removal of timber wrongfully cut down.

*Lord* CHANCELLOR.

I have no doubt about the interference of this Court to prevent waste; the only difficulty, I have, is, as to what shall be done with the timber cut. Trover might be brought for it: but as the *Register* says, many orders of this kind have been made, take the order.

1790.

*Feb. 12th.*

Decretal order  
cannot be dis-  
charged upon  
motion; though  
made by con-  
sent, and surprise alleged.

ANONYMOUS.

**MR. MITFORD** moved to discharge an order made at the hearing for farther directions after a decree; upon the ground, that it was by consent; but the party had been surprised; and there was no other way of doing it.

*Lord* CHANCELLOR.

I cannot upon motion discharge an order made upon farther directions, which is a decretal order; and its being by consent, or otherwise, will make no difference. Certainly if by a clerical misprision any thing was inserted in the order as by consent, to which the party had not consented; there must be some way of rectifying it; and I should suppose, it might be by bill of review; but it cannot be done by motion. I might as well take upon me to alter any other part of the record.

1790.

ANONYMOUS.

CHILD v. LORD ABINGDON.

[ 94 ]

1790.

Feb. 12th.

**M**OTION for an order upon a purchaser of part of Lord *Abingdon's* estate to complete his purchase by paying the purchase-money with interest at 4 *per cent.* from the time he was reported best purchaser; also that he should appoint a clerk in Court. He lived in *Westmoreland*. The interest purchased was a reversion upon an estate for lives, on which there was one life remaining at a very trifling rent. He was reported best bidder before Christmas 1788, since which time he took no steps to complete the purchase.

Interest against a purchaser for delaying payment. Court will not make purchaser appoint a clerk in Court; which is only necessary, where the party is to appear.

Mr. *Hardinge*, for the motion.

The purchaser only waits, till the remaining life drops; in the mean time Lord *Abingdon* is paying heavy interest to his creditors.

*Lord* CHANCELLOR.

He must pay interest. A man cannot purchase a dry reversion, and then lie by for years; and expect to pay no more for it then, than if he had completed it immediately. But I cannot make a purchaser appoint a clerk in Court: it has never been done. A clerk in Court is only necessary, where the party is to appear; which is not the case here.



1790.

March 2d.

## COGLAR v. COGLAR.

Upon a suit in Ecclesiastical Court by wife for alimony, *Quære*, whether before the decree Court will grant writ of *ne exeat regno* against husband?

[ \*95 ]

**M**OTION by a wife for a writ of *ne exeat regno* to prevent her husband from leaving the kingdom, which threatened, till a suit, instituted by her against him in Ecclesiastical Court for alimony, charging him with crime and adultery, should be determined; unless he should give sufficient security to answer the event.

\* Mr. Johnson, for the motion.

*Read v. Read*, 1 Ch. Ca. 115, motion to supersede the writ was refused: there had been a decree in the Ecclesiastical Court. Sir *Jerome Smithson's case*, 2 Vent. 345, motion by wife, suing for alimony in the Ecclesiastical Court, for *exeat regno* against her husband was granted. It does not appear there, whether there had been a decree in the Ecclesiastical Court. The *Lord Chancellor* said, it had been granted before. In 2 Atk. 210, the writ was refused; but this case of a wife suing for alimony was noticed; in which Lord *Hwicke* said, it had been granted out of compassion to the wife and to aid the Ecclesiastical Court.

*Lord Chancellor.*

For what sum should I mark the motion?

For the motion.

That must be left to the discretion of the Court. It is the case at law, where upon a personal tort a Judge directs the Defendant to be held to bail.

*Lord Chancellor.*

The question, I asked, seems to be an insurmountable objection (60). I know, that has been done at law sometimes upon affidavit to enable the Judge to form an opinion, an analogy to some cases, now I believe a little exploded, that the Judge may increase damages. I am afraid, it cannot be done under the notion of aiding the Ecclesiastical Court.]

look into the cases, and, if I can find an instance, will (61).

) See post, *Shaftoe v. Shaftoe*, *Dawson v. Dawson*, *Oldham v. Oldham*, *Etches v. Lance*, Vol. 171, 173, 410, 417. *Haffey v. Haffey*, XIV, 261. In *Roebuck v. Roebuck*, cited in *Shaftoe* from the Registrar's book the writ was granted upon an appeal for an increase of alimony decreed. See as to this writ generally, *De Carriere v. De Carriere*, IV, 577, and the note 592, and Mr. Beames's *Brief View of the Writ*; and particularly as to the case of *Roebuck v. Roebuck*, the note 42, 2d edit.; where it appears also from the Registrar's book that no order was made in *Coglar v. Coglar*.

1790.  
COGLAR  
v.  
COGLAR.

EVANS v. EVANS.

OPTION to discharge a writ of *ne exeat regno* obtained by a wife against her husband, upon his paying into the sum of which the security was taken.

was opposed by Mr. *Mansfield*; but granted, as a better writ (62).

) Post, Vol. XIX, 314. *Beames's Ne Exeat Regno*, 86, 2d ed. *v. Swinton*, 1 *Ves. & Bea.* 371.

[ 96 ]  
1790.  
March 2d.  
Writ of *ne exeat regno* discharged on paying into Court the sum, for which it was marked.

RHODES v. RHODES.

PREVIOUSLY to the marriage of Plaintiff with her late husband he in *January*, 1786, executed an indenture, by which, in consideration of receiving some notes, her property, covenanted for himself, his heirs, executors, and administrators, that in case his wife should survive him, she should have a life annuity of 20*l.* to be in lieu of all her claim upon his personal estate. He received the notes and the money due on them to the amount of 400*l.* and died. His executors

1790.  
March 5th.  
Members of a society covenanted mutually, that their widows should receive annuities from the society; payment from the society is not a satisfaction

for a covenant in the settlement by the husband to pay her an annuity in lieu of all claim on his personal estate.

1790.  
 RHODES  
 v.  
 RHODES.

refused to pay her the annuity, because her husband had been member of a club, in which the widows of the members were entitled to an annuity; and she had received several payments, though not to the amount of 20%. a year; which, the executors insisted, ought to be a satisfaction for so much. Upon which she brought a bill against them for an account of the personal estate, and to have a fund set apart for securing this annuity.

*Solicitor General* and *Mr. Richards*, for Defendants, were desired to begin.

[ \*97 ]

If this demand can be resisted at all, it must be on this ground; the annuity by the settlement was to be in full of all her claims on his personal estate; and if she chooses to take 20%. a year from the society, it ought to be a bar to the other; for the society is formed by persons entering into an agreement \* with each other; she could not recover from the society in any other way, except by the executors suing the society upon the covenants they entered into with the husband: the executors must bring the action. If they did so and recovered, and paid over to her, it is a satisfaction because it is a part of the personal estate of testator. If she is to have both these annuities, she will have more, than her indenture gives her.

*Lord CHANCELLOR.*

I rather think, the action against the society must have been brought by the executors: but must go upon this subtlety, that because the executors must bring the action, whatever is recovered in it, would become part of the personal estate of the testator; and consequently is a bar to her other claim: there is nothing in it.

---

Decree for plaintiff.

GRIFFITHS v. SMITH.

1790.

March 5th.

**THOMAS LLOYD**, 29th July, 1772, devised all his real estate to his mother for life; remainder to trustees to preserve contingent remainders; remainder to his nephew *Thomas Griffiths* for life, remainder to his first and every other son in tail; remainder to his nephew *John Griffiths* in the same manner; remainder to his niece *Sarah Griffiths* in the same manner. His personal to the amount of 4700*l.* he gave in trust to pay the interest to his mother for her life; and after her death to pay 2000*l.* to his nephew *John Griffiths*; and 2000*l.* to his niece *Sarah Griffiths*; to be paid to each respectively in case of the mother's death upon attaining the age of twenty-one. Then came a proviso, that if *John* or *Sarah* should "at any time" become seised and possessed of his real estate; the legacy of such person so becoming seised should go to the younger children of *Sarah*. The testator died; the mother also died; by whose death the elder nephew *Thomas Griffiths* was tenant for life, remainder to his issue in tail. The legatees *John* and *Sarah*, being of age, brought the bill against the trustees, to whom the executors had paid over the personal, to have their legacies paid.

Legacy payable at twenty-one, with proviso to go over, if legatee should, at any time become seised of the real estate, to which he was entitled in remainder after an estate tail limited upon an estate for life subsisting, when he became twenty-one.

Even supposing there is a contingency left, he must have the legacy at twenty-one; but it may be disputed afterwards upon the happening of the contingency.

[ \* 98 ]

\* *Solicitor General*, for Plaintiffs.

The question arising upon this proviso is, whether notwithstanding Plaintiffs have attained their age, and though at the death of the mother neither of them was entitled to the real estate, they are entitled to have their legacies absolutely; or whether they are to remain subject to the contingency, that if either of them should ever at any future time by failure of issue of the elder brother become entitled to the real, the legacy of such person must be refunded. The meaning is, that if they are twenty-one at the death of the mother, at which time their respective legacies became payable, not being then possessed of the real, to which the elder brother or his issue can be entitled to them, before some of the issue suffer a recovery to defeat the contingencies.

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v.  
SMITH,

*Lord CHANCELLOR.*

Suppose there is a contingency left, Plaintiffs must have money; for I cannot keep it in Court all that time to wait the event. I am rather of opinion at present, that if the brother was to die without issue in the life of one of the legatees, the younger children, to whom the legacy is given over, would be entitled to it: but I apprehend, I must not give these legacies to the Plaintiffs. When the contingency arises, it will come to be disputed, if it ever will arise; but *non constat* now, that it ever will (63).

(63) The decree for Plaintiffs was ordered to lie in minutes for three or four days: but it was not mentioned again. In *Fawkes v. Gray*, post, Vol. XVIII, 131, a similar decree was made for immediate payment, with security, upon the authority of the case.

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1790.

*March 9th.*

Costs refused.

FORBES v. TAYLOR.

THE question was as to the costs after a verdict upon issue directed, found against the legitimacy of a child claiming a legacy as a legitimate child.

*Lord CHANCELLOR*

Refused costs against him; as he had always borne the expenses of the family, and been received in it.

1790.

*March 12th.*

Interest upon  
interest not  
given.

WARING v. CUNLIFFE.

SOLICITOR GENERAL applied for interest upon interest.

*Lord CHANCELLOR.*

My opinion is in favour of interest upon interest; because I do not see any reason, if a man does not pay interest, why he ought, why he should not pay interest for that also. I have found the Court in a constant habit of thinking that

trary; and I must overturn all the proceedings of the Court, if I give it (64).

(64) *Proctor v. Cooper*, *Pre. Ch.* 116. *Thornhill v. Evans*, 2 *Atk.* 330. *Ex parte Morris*, post, 133. This habit of Courts, administering justice on equitable principles, against compound interest seems well warranted by the policy of not permitting one party to delay his remedy at the expence of the other; the improbability, that the effect of the decree will be merely refunding profits actually made by a person so improvident as to incur such a charge; and hence the ruinous consequences in most cases. To considerations of this nature is probably to be attributed, that with the exception of contract, which must not be prospective, (*Ex parte Bevan*, post, Vol. IX, 223, 271. *Eaton v. Bell*, 5 *Barn. & Ald.* 34.) the cases of mortgagee in possession, (2 *Atk.* 410. *Robinson v. Cumming*) of vendor and purchaser, (*Griffith v. Heaton*, 1 *Sim. & Stu.* 271,) and the renewal of a lease by tenant for life (*White v. White*, post, Vol. IV, 24. IX, 554), standing upon peculiar grounds, a decree for compound interest has been confined to the case of a gross and wilful breach of an express trust to accumulate for infants; as in *Raphael v. Boehm*, and *Dornford v. Dornford*, Vol. XI, 92. XII, 127. XIII, 407, 590; and is so unusual, that the Court, with the assistance of the

Masters, found considerable difficulty in determining the manner of executing such a decree. Even against a mortgagee in possession it is directed, not of course, but only under special circumstances, and never for a broken period: *Davis v. May*, Vol. XIX, 383. *Coop.* 238. referring to several precedents; *Donovan v. Fricker*, 1 *Jac.* 165. In cases of breach of trust generally, even of the grossest description, the Court goes no farther than to give the profit actually made, or, if that cannot be ascertained, 5 *per cent.*; and for that rate of interest a special case, beyond mere negligence, of actual profit, is required: post, *Ex parte Chumley*, 156. *Seers v. Hind*, 294. *Piety v. Stace*, IV, 620. *Pocock v. Redington*, *Long v. Stewart*, V, 794, 800, *n.* *Rocke v. Hart*, *Mosley v. Ward*, XI, 58, 581. *Bate v. Scales*, XII, 402. *Ashburnham v. Thomson*, XIII, 402. *Ex parte Townshend*, XV, 470. *Dawson v. Massey*, 1 *Ball & Beat.* 219, and the note, 231. *Tebbs v. Carpenter*, 1 *Madd.* 290. *Heathcote v. Hulme*, *Crackelt v. Bethune*, 1 *Jac. & Walk.* 122, 586. *Clayton's case*, 1 *Mer.* 580, in *Devaynes v. Noble*. In one case, of recent date, and the highest authority, *Stackpoole v. Stackpoole*, 4 *Dow*, 209, a direction for rests and compound interest on annual balances was

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given, simply on misconduct of an administrator, of a gross nature certainly, but counterpoised by considerable laches in calling him to account. It is to be regretted, that the judgment of the House of Lords, as it appears pronounced by Lord *Redesdale*, does not state the reasons for such a direction in that instance, inconsistent, as it seems, with "the constant habit" of the Court, as declared by Lord *Thurlow*, confirmed by the whole stream of authority.

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ELLISON v. COOKSON.

March 8th, 9th.

3 Bro.C. C. 61.

2 Cox, 220.

Portion a satisfaction of a legacy from the father to the same amount; the evidence not being sufficient to repel the presumption.

**JOHN COOKSON** being seised of a small real estate consisting both of freehold and copyhold, and possessed of personal property to the amount of between 90,000*l.* and 100,000*l.* and being engaged in some iron works, made his will 1774; by which he gave his real estate to his eldest son, except his copyhold lands and coal mines, which, he directed, should be enjoyed by his wife for her life: and gave all the rest and residue of his fortune to his wife, charging her with the tuition and education of his younger children; and empowering her to provide for them as she should think proper; and made her sole executrix. This will was duly executed; and after the execution, upon the same paper and without any fresh date were these words, "*Instructions or advice to my wife as to the younger children.*" In these instructions he appointed 10,000*l.* to each of his three sons for their lives; remainder to their issue; and 5000*l.* to each of his two unmarried daughters; and directed his wife to apply all the surplus of his fortune, after deducting her own expences, to the purposes before mentioned. Then at the bottom of the page were the words "*turn over;*" and upon the other side these words "*and I also add, that all the savings, my wife or I shall make, shall go to her to be disposed of either in her life or by will among such of my children, as she shall think fit.*" A third daughter, who had been married before the date of the will, and had received 5000*l.* as her portion, was not noticed in any part of this instrument. About two years after the date of the will a treaty of marriage was set on foot between *Richard Ellison* and *Hannah Cookson* one of the mentioned daughters of testator;

tator; which was principally carried on by Mr. *Buck*, who had married a daughter of Mr. *Ellison*, sen. The marriage took place in 1777; and testator gave his daughter 5000*l.* as her portion. Testator died 1783, without having revoked or altered his will; upon which Mr. *Ellison*, jun. and his wife brought the bill against the widow of the testator for the legacy of Mrs. *Ellison*. Defendant insisted, that the portion was an ademption of the legacy; and the bill was dismissed by Lord *Kenyon*, then \**Master of the Rolls* (65). The cause came on again upon the petition of the Plaintiff for a re-hearing.

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The evidence consisted of the depositions of *Buck*, and of some letters which had passed between him and testator upon the subject of the marriage, what portion testator would give his daughter, and what *Ellison*, sen. would do for his son. From *Buck's* depositions it appeared, that testator in a conversation between him, *Ellison*, jun. and *Buck*, at *Whitehill*, testator's residence, agreed to give his daughter 5000*l.* as a portion, and said, she would have something considerable more at his death, equal, or nearly equal, to what he intended as her portion; that it was also agreed, that *Ellison*, sen. should settle 400*l.* a year upon the issue male of the marriage; and he swore, that if in the minute, he had made at the time, he had mentioned "*issue*" generally, it was a mistake; for "*issue male*" only was intended: that *Ellison*, sen. also said, he would give his son his *Lincolnshire* estate (about 600*l.* a year) at his death: that testator wished to have the whole of this estate settled on *all* the issue of the marriage *immediately*; which was refused: and *Ellison* pressed to have the farther sum, which testator said, his daughter should have at his decease, specified and secured; which was refused on the other side on the ground, that *Ellison* might as well trust the word of testator, as testator trust his. *Buck*, being very anxious to bring about the match, prevailed on *Ellison* to consent to it on these terms; which he at last did, very unwillingly. This occasioned the material letters: the first of which was from *Buck* to testator, as follows:

"*I can only say in answer to the conversation between us* (66),  
"*that as Mr. Ellison hopes, the provision, you said, you*  
"*intended*

(65) 2 *Bro. Ch. Ca.* 306.

(66) *i. e.* himself, testator, and *Ellison*, jun.





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*"intended to make at your decease for your daughter, with
 "equal, or nearly equal, to what you intend to give her at
 "marriage, he will rest perfectly satisfied with that
 "gagement."*

The second letter was the answer of testator, in which
 complaining of the inadequacy of the settlement, which,
 says, will be very scanty, particularly if their issue should
 daughters, he proceeds thus :

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*"You must mistake Mr. Ellison, (jun.) the mistake
 "arise between what may be probable and possible. I
 "him my present plan ; which will be executed by my wife
 "the longer liver. I shewed him the yearly account of
 "iron works, from the success of which my most mate
 "excrescences will arise, to which I refer him for far
 "explanation, if necessary. I should be very sorry, that
 "misunderstanding should arise, when it may be out of
 "power to remedy it."* Here the correspondence ended :
 upon this evidence the question was, whether the portion
 or was not an ademption of legacy.

Mr. Mansfield, Mr. Lloyd, and Mr. Graham, for Pl
 tiffs.

The question is, whether this legacy is taken away by
 thing, that happened subsequent to the will, or whether
 legatee is not entitled, notwithstanding the fortune given at
 marriage. I do not now dispute the rule of this Court ;
 if a father gives a legacy to the child, and afterwards in
 life advances the like sum to that child, that will be an ade
 tion, though it would be otherwise as to a stranger. I
 was too well settled in *Debeze v. Mann*, and *Powel v. Clea*
2 Bro. Ch. Ca. 165, 499, 519 ; though it is rather a hard r
 and has been so considered both by your Lordship and
 Lord Hardwicke ; and cases have been taken out of the r
 wherever it could be done ; as the case of a natural ch
Grave v. Lord Salisbury, 1 *Bro. Ch. Ca.* 425, and the cas
Shudal v. Jekyl, 2 *Atk.* 516 ; where a niece was adjudged
 be out of the rule. But if there is any evidence to shew,
 tator intended to give something more, that is sufficient
 prevent the rule from taking place. Your Lordship deci
 that in *Debeze v. Mann* ; and here the evidence is stron

t

than there; for exclusively of the last letter there is no doubt, as it is clear from *Buck's* evidence, that he absolutely declared his intention, and engaged to give something considerable at his death; and, when called on, refused to specify the sum, and rested on that general assertion. In the last letter, though the latter part of it is inaccurately written, and something seems to have been left out, yet the fair result confirms *Buck's* evidence. The plan referred to there must mean, what he calls instructions or advice in his will; there is nothing but that, which can bear the name of a plan. It contains the whole of the fortunes, he intended for * his younger children. These declarations after the body of the will are not codicils; for they are written on the same paper and at the same time: it is impossible to distinguish between one part of this paper and another; or to confine the word "*plan*" to the last addition, which gave the savings to the wife to be disposed of among the younger children: that he could not call a plan; the other he might. This letter therefore does not vary *Buck's* evidence; but confirms it, by shewing that he did express an intention to add something considerable, to what he had given by way of portion. But it is always a question of evidence; and this is not the proper tribunal, but a jury. The circumstances are much stronger to shew, the party intended, that this should not be an ademption, than that it should. In all the time he lived afterwards, he never declared to any of his family, that this should be a satisfaction; which is very extraordinary, if he intended it. Defendant ought to prove, that he did intend a satisfaction; for the least evidence, that this was not all, he intended to give her, is sufficient for Plaintiff; and will take it out of the rule. When he advanced the portion, he made a declaration, that it was not all, he intended to give her; and then he knew, he had left her 5000*l.* by will; and so he meant to say, that he would keep it in his own power either to revoke his will, or let it stand, in which case she would have both. In *Debeze v. Mann*, the sum was not specified; but your Lordship thought on the evidence, that it was clear, he had not made up his mind, and that it was sufficient to repel the presumption. It is very fair to send it to a jury.

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For Plaintiff.

To try whether he intended, the portion should be an
ademption of the legacy.

*Solicitor General, Mr. Mitford, Mr. Ridley, and
Mr. Richards, for Defendant.*

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This last letter was concealed from Defendant; and the bill was filed without the production of it; on which account it was necessary to file a cross bill. The ground of Defendant's claim is the common rule; that, where a parent gives a sum of * money to a child by will, the Court will presume ademption, if he gives the same sum in his life by way of portion. It is at this day well settled, and is founded on the idea, that testator, when disposing of his property considers, what portion of it he shall give to each of his children; and, having made a disposition accordingly, if in his life he does the same thing as to one child, that child ought not to have a similar benefit under the will. One consequence is, that, if the Court lays it down as a rule, it will require strong evidence to repel the presumption; and the mere circumstance of suffering the will to stand is not sufficient. The rule may in some instances have done injustice; but in this case it is impossible to say, that, if testator had died next morning, it would not have been an ademption; and if so, the circumstance of his having lived so long after will make no difference; for a mere circumstance of that kind has never of itself been held sufficient to rebut the presumption. The daughter who was married before, was not named in the will, because she had the same portion. It is said, the case must be perfectly clear to favour the presumption; but on the contrary there must be clear evidence to repel it; for it is a good presumption, till the contrary is shewn. It is not therefore enough to state, that he did during any part of this treaty say, he would give his daughter something more, but it ought to be clear. In 1774 he meant to provide for this daughter as he did for his other daughters; in 1777 he retained the same idea; and then was so far from changing it, that he would not engage to give her more. If any thing remained

ained unexplained during or at the conclusion of the treaty, it was the fault of those, who received the last letter, not of the testator, who expressed a wish to avoid disputes. There is strong reason to suspect, this was not thought of, till after his death. It is probable, he knew this rule; for *Buck* was a professional man, and must have known it. In *Hartop v. Whitmore*, 1*P. Will.* 681, Lord *Macclesfield* considers it as clearly settled, that it is a revocation in the law of all other nations as well as by our law; because not to be supposed the father intended two portions for one child. He mentions a circumstance, much relied on here; the length of time between the gift and his death. In that case it was four years. With regard to that he says, there could be no need to revoke the legacy, because he had done so by giving it in his life; and to have struck it out of his will would be to revoke it twice; and *in that case a smaller sum was considered as an ademption of a larger legacy.

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Lord CHANCELLOR.

Has not that case been denied to be law? It is according to the rules of the civil law, which go to that extent: but the reasons, they give, do not support it; for he is making a provision in the one case with regard to his death, in the other with regard to his life; and the Courts have supposed, that all, he can spare in his life, is all, he means to leave at his death.

The presumption of satisfaction of a legacy to a child by a portion, is according to the civil law; but is not supported by the reasons given for it.

For Defendant.

The single question is, whether there is any evidence, that he meant, she should have both these equal sums. When he made the will, he intended, she should have nothing more than the 5000*l.* He intended, his two remaining daughters should take equally with her, who was married, to whom he had given that sum. The last letter shews, it was not his intention. It is impossible, that can allude to the legacy. He had given her what was fully equal to that sum, and a chance of something more; so when he complained of being misrepresented, he could not mean, as to what he had given her by will; but his answer is, that he had disclosed his plan; which was to give each 5000*l.* and a probable benefit, to depend on savings

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savings likely to produce a fund. According to Plaintiff's construction he must be supposed to have departed from the plan; and to intend to give her 10,000*l.* which he did not intend, when he made the will; though in this letter he professes not to have departed from it. His adhering to it shews he did not mean this; but intended her 5000*l.* *certain*, and a farther *uncertain* benefit; which accounts for the words "*probable and possible*;" for he did not know, how long he and his wife might live; upon which, and the produce of an uncertain work, it would depend. In *Debex v. Mann* the disposition in the will was for a natural child, and very small whereas he had made other large dispositions to his legitimate children. It was impossible to measure testator's bounty to that child. The words were, that she should take something considerable more at his death; and there was nothing else to satisfy those words, as there is here. To each of his sons, the more immediate objects of his bounty, he has given 10,000*l.* only for their lives, then to \* their children; and it is not likely he should give this daughter, or rather her husband, that sum absolutely; particularly as the settlement was not such, as he intended for her. Therefore very distinct evidence is necessary. She is not entitled to any thing, if not to 5000*l.* for there is nothing else to govern the decision; and that sum was not intended to be given, because a specification was refused. The plan alluded to was all these papers taken together. By the first all must have something, the residue being given to the wife to dispose of among the children, as she should think fit. The second being to such of his children as she thinks fit, allows her to give it only to one, if she pleases. The words "*probable and possible*" may refer to her power of distribution.

Lord CHANCELLOR.


You cannot possibly argue, that the word "*plan*" refers to the whole will; for if so, I must give her every thing, she can have by it, and consequently this legacy.

Reply.

Upon the whole evidence there is a sufficient assurance by the testator, that he would make a farther provision for this daughter

daughter at his death; I say at his death, for both the conversations and letters go to something expected by *Ellison* at his death. The true way of construing testator's letter is by referring it to the original letter, to which it was an answer; we see from both, what the subject was. The first proves, he had said, he would give a sum equal, or nearly equal, to the portion; *Buck's* evidence also proves a positive declaration to the same effect. In the answer after the words "*probable and possible*" I should think something left out; and that he meant to go on to the third degree; what was certain. Nothing was said about it during his life, because it was not to take place till after his death; for after this letter nothing was certain, but it became voluntary; he had not engaged anything absolutely, but reserved the *quantum* to himself; and to have urged him on the subject in his life would have been improper. He cannot refer to a plan to be executed by his wife, for the letter is an answer to another, which speaks only, of what is to be given at his death; and there is no question about any thing: unless, as his wife was his executrix, he may be supposed to say in that sense, that his present plan was to give her a \* sum equal, or nearly equal, to the portion, and that it was to be executed by his wife. If he told *Ellison* of his will, then the legacy must be due as part of his present plan; which means a plan of a disposition of his fortune at his death, not his plan before the marriage. No inconsistency arises from his refusal to specify the sum, for on account of the uncertainty of trade he would not bind himself. It is not probable, that he, who was an ironmonger and banker, was acquainted with the rule of this Court; and would be very extraordinary to suppose he mentioned, what he had given her at his death, just to shew that by the marriage it was taken away. The conversation could be with no other view than to induce *Ellison* to believe, that unless he should be influenced by the alteration of his circumstances, or some other reason, to change his intention, she would have 5000*l.* more at his death. The *Ellisons* did not call for an explanation of the letter, because they did not doubt the sense of it, understanding that he declined engaging certainly, but expressed an intention to give something considerable more at his death, which from the conversations, they supposed, would be about

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equal to the portion. The cases do not apply. In *Hartop v. Whitmore* it was determined, that length of time without altering the will does not of itself afford much argument; if nothing else in the case; but when there is such evidence as this of an intention to make a further disposition, his suffering it to remain unaltered so many years puts it in a very different light, from what it would have been in, if he had died next morning. The word "*excesses*" may apply to his gift of the surplus beyond the expences of the wife to her to answer the payments specified. Whatever that word may mean, it cannot destroy the natural construction of this letter; which is, that he intends to give something more, but will not engage for any thing certain; and if that is the construction, *Debeze v. Mann* and the other cases prove the Plaintiffs entitled.

Lord CHANCELLOR.

Legacy to a
 child deemed
 a portion.
 Thence arises
 the presump-
 tion.

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The presump-
 tion cannot be
 tried by a jury;
 as it is a pre-
 sumption of
 Law.

May be rebut-
 ted by evidence
 of intent, that
 the legacy shall
 still be a sub-
 sisting benefit.

When this was first opened, I confess, I thought, the judgment was wrong: now it turns upon a nice question of intention; but my present opinion is in support of the judgment. The common way of arguing this is to forget entirely the rule of law; namely that, where a legacy is given to a child, it is deemed a portion, and therefore carries with it these qualities; * that it is a deliberate distribution among his children of such portions, as he thinks fit. Crediting him for that deliberation, if he advances in his life that sum, which he has adjudged to be the due and proper portion for that child, the presumption of law is, that he has satisfied that intent, and consequently that it is no longer a ground for any farther demand. I lay a stress on the words, "*presumption of law*," because in arguing this question it is generally put, as Mr. *Lloyd* wanted to have it put, as a question for a jury, as to what the intention was on the whole transaction. The objection to that is, that it is not a presumption of fact, but a question upon the validity of a presumption of law; and I cannot send that to be tried by a jury. But though it is a presumption of law, it is not that kind of conclusive presumption, against which nothing can be said: but a presumption, which the law makes upon the general facts, liable to be rebutted by evidence; and the kind of evidence for that is any demonstration from the conduct
 and

and language of the author of both gifts, that he considered the gift by the will as still a subsisting benefit. If that can be proved, the consequence will be rebutting the presumption of law, that he meant to adeem: and when speaking of these engagements and the other circumstances, it must be remembered, that their whole effect is to raise evidence of its being in testator's contemplation, that his will remained unsatisfied. Taking it in that point of view, what is the transaction? The settlements, and their relative value, I now consider as beside the purpose. Much struggle was made by the *Ellisons* to try, whether they could not get more than 5000*l.* as the fortune, the son was to have with her; and after pressing a great deal for a specification and security, that something more should be added, the conversation was pretty fairly stated by *Buck* in a letter, written to *Ellison* the father, to induce him to conclude it upon the terms then in question: for it states, that *Cookson* would not engage for a particular sum, and by no means would consent to secure that sum. I do not believe, his letter to *Cookson* was with a view to surprise; but it was stretched a little in the manner of putting it to him; for he tells him, the answer of *Ellison* is, "*as he hopes, the provision, you said, you intended to make at your decease for your daughter, will be equal or nearly equal to what you intend to give at her marriage, he will rest perfectly satisfied with your word:*" now to talk of reposing their satisfaction upon the word supposed to be given, is, (I do not say designedly) *going a little beyond the point of the conversation; for it was laying the man, charged with the expression, under a promise: it became therefore very expedient for *Cookson* to go into a farther explanation. It is truly said for Plaintiff, that the farther explanation must be taken with the letter, which occasioned it; for it does not contradict that letter *in toto*; it says nothing as to the sum being equal or nearly so to what he would give as a portion: it leaves that not contradicted, and as to that therefore it must be admitted. The mistake he mentions must mean as to his *engagement*, that the sum shall be equal or nearly equal. The words "*probable and possible*" are, I know, a common expression in *Scotland*. By that he meant to give an idea, that it was

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probable and possible, that it would be equal or nearly so. If he had left it there, I should have thought, it would have carried the whole; because it would have wanted a more distinct explanation, than that general phrase would have given it. Not to give those hopes, he refers to the conversation; and that turned upon a plan, to be executed by the wife. What was that plan? When I first read it, I conceived, that considering the last words in the will itself, and the phrase of the codicils (though they are not strictly codicils, I will call them so) the whole codicil must have been in his contemplation. In fact it would then have been an inaccurate expression; for the codicil goes to leave 40,000*l.* out of the distribution of the wife. But to shew, that inaccuracy was not his meaning, he has gone farther by speaking of the iron works, from the success of which, he says, his most material excrescences will arise; and refers him to an account of them. He by his letter charges *Ellison* with being in possession of his real mind; and that it was turning upon that part of the plan, to be left in the execution of his wife; and that plan turning in itself upon the excrescences from those works. In the codicil he says, that what savings, he or his wife shall make, shall be disposed of among such of the children, as she shall think fit, either in her life or by will. This therefore compared with the phrase there used, and to which he refers, as having been told to him, must be deemed to be a true explanation of the idea, upon which the conversation proceeded; and consequently of the extent of the hope he held out, of what more she would have. My opinion is, that, if this doctrine of the civil law, regulated, as it is, by the decisions of our Courts, had never existed; and if now the question was, whether, according \* to the genius and simplicity of the law of *England*, all effectual instruments, a man leaves behind him, should take effect according to the import, it would be wiser that Courts should not busy themselves to rebut them by evidence; and that neither the presumption on the one hand, nor the rebutter of it upon the other, had been ever a part of the law of *England*: but I am not at liberty to turn out a rule of so long standing, and introduced by men much wiser, than I can pretend to be.

I must

The presumption admitted, but the principle of it disapproved by the Court.

[ \*110 ]

I must therefore admit the presumption (67). When I have stated my doubt about the presumption, I do not know, that this is a case, which would have afforded the best materials to raise that doubt to the highest point; for though I do not say, that the testator was apprised of the presumption, yet the law intends, that he did know it, as it intends every man to know its rules; and this removes all dispute about the length of time. But I think here it is rather probable, that he had heard of the rule, as he might, by accident; or else he would have struck the legacy out of the will. There is reason to imagine, that the decree given in this case falls in with the intention of the testator, though that does not always happen. All the observations must turn upon the effect of rebutting the presumption, and not upon the validity of the presumption itself. He had three sons and three daughters; one daughter was married before the will; to her he had given 5000*l.*; it appears upon the will, that instead of giving 45,000*l.* which, if he had been to provide for the three daughters, as well as the sons, he would have done, he has only given 40,000*l.*: it appears, that he had it in his hopes to raise another sum: it seems to be agreed on all hands, that he left about 90,000*l.* or 100,000*l.*: it appears, that he determined to fix pretty nearly a moiety among the children; and to leave another moiety to be disposed of by his wife, in order to keep the children obedient to her. By the conversations, he held with *Ellison* and *Buck*, he seems to have hoped, that that would be divided in much the same ratio, as that, in which he had himself divided the other; for the consequence would be, that this child would have a sum equal or nearly equal to that, he had advanced. These words, as they stand, cannot be thrown \* by, when it is a question of rebutting the presumption; for the words "*equal*" "*or nearly equal*" shew the hope of an uncertainty. To describe a certainty this would not be accurate; and it is more probable, that he did mean to speak of a thing, which was to depend upon chance and hazard to be defined. The answer

1790.  
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[ \*111 ]

(67) A similar rule, that a legacy is a satisfaction for a debt, equal to or less than it, acknowledged, but disapproved by the Court: *Mathews v. Mathews*, 2 *Ves.* 635. *Chancey's case*, 1 *P. Will.* 4th ed. 408, 410, n.; where the cases are collected.

1790.

ELLISON  
v.  
COOKSON.

answer in his own letter has explained, what his mind was turning upon; for he was referring to a probable event and it has turned out exactly according to the description for it would be enough to give her as much more, or nearly so. Now the single question being, whether the testator had expressed, that it was in his contemplation, that the provision in the will should be a subsisting one, notwithstanding the portion, he had given; and with sufficient particularity I must pronounce, that this notion of a subsisting bounty was confined to that part, which, he hoped, would be transmitted to her through his wife. In saying this it is obvious that what I have often repeated during the course of this cause must be true; namely; that, if he had referred generally to the will, it would have carried this legacy: for when I am obliged to find in his expressions particularity enough to tie it up, I must admit, that if he had referred generally to what she would have had by the will, the extent of that reference would be evidence to the whole of the will. If he had said "*she is the object of my bounty, and therefore greater expectations may be formed upon that circumstance.*" I should have said, that whatever the will appointed to her she should have had by virtue of that general reference. But this under the terms used, and by the presumption, may be confined to those expectations, she derived under the will, without being extended to the rest; and in this instance, I believe, the presumption has coincided with the intent. In giving an opinion of this kind I found myself upon a belief, that the husband must have had great confidence in his wife, before this trust was committed to her; and perfectly expected, that none of his children, and particularly not one, of whom he seemed to be fond, should be treated more harshly, than the rest without great misconduct; and therefore that lady will, I dare say, consider, that this suit will not absolve her conscience from performing her husband's wish: and his intention seems pretty clearly proved: this letter proves pretty well, that the husband thought, he had some way or other secured out of the residue a provision for her at least equal to that, he had given her out of the fixed part. The Defendant, I dare say, will not mind this bill being filed; for there can be no doubt about the intention.

For Defendant.

It would not have come on, but that Mr. *Ellison* was resolved to try the right. I am sure, this suit will make no difference. Defendant will agree to their withdrawing their deposit.

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ELLISON  
v.  
COOKSON.

The decree was affirmed (68).

(68) Upon satisfaction and performance, see Mr. Cox's note to *Copley v. Copley*, 1 *P. Will.* 148. Mr. Sanders's note to *Bellasis v. Uthwatt*, 1 *Atk.* 427; and in this work, the following references and the notes: *Baugh v. Read*, *Fernight v. Grant*, *Finch v. Fiach*, post, 257, 259, 298, 525, 534. *Richardson v. Elphinstone*, Vol. II, 463. *Hinchcliffe v. Hinchcliffe*, *Sparkes v. Cator*, III, 516, 530. *Couch v. Stratton*, *Tolson v. Collins*, IV, 391, 483. *Freemantle v. Bankes*, V, 79. *Pole v. Lord Somers*, VI, 309, 325, 420. *Trimmer v. Bayne*, VII, 508. *Twisden v. Twisden*, *Robinson v. Whitley*, IX, 413, 577. *Garthshore v. Chalie*, X, 1. *Wallace v. Pomfret*, XI, 542. *Ben-gough v. Walker*, XV, 507. *Hartopp v. Hartopp*, XVII, 184. *Chave v. Farrant*. *Ex parte Pye and Dubost*, *Onslow v. Michell*, XVIII, 8, 140, 490. *Wetherby v. Dixon*, XIX, 407. *Coop.* 279. *Monck v. Lord Monck*, 1 *Ball & Be.* 305. *Curzon v. De la Zouch*, *Goldsmid v. Goldsmid*, 1 *Swanst.* 185, 211. *Thellusson v. Woodford*, *Wathen v. Smith*, 4 *Madd.* 325, 420. *Bell v. Coleman*, 5 *Madd.* 22.

COMINGS, *Ex parte*.

1790.

April 20th.

UPON a bankruptcy petition by a mortgagee for sale of the mortgaged premises being allowed, Mr. *Abbot*, for the petitioner, desired, that the sale might be by auction in the country.

Upon bankruptcy the mode of selling an estate is left to the Commissioners, not directed by the Court, as in a sale by a Master.

Lord CHANCELLOR.

The Court does not give directions about the mode of selling the estate; but leaves that to the Commissioners; who will sell in the manner, they think most advantageous (69). It is not like the sale of an estate by a Master.

(69) By Lord *Loughborough's* General Order, 8th *March*, 1794, the mortgaged premises are to be sold before the Commissioners, or by public auction at any other place or places, if they shall so think fit.

1790.

April 14th,  
20th, 23d, 26th.

O'REILY, *Ex parte*.

The Court refused to seal a patent for representing *Italian Operas*; because the provisions for carrying it on were by agreement with the *Lord Chamberlain*; his executors and administrators; and the right to the patent was not sufficiently connected with the property in the House.

[ \*113 ]

Not sufficient for the party applying merely to answer objections; but he must lay a proper case.

Upon such application the Court will take care, that the King is not deceived, nor his object disappointed; and will represent the whole to

the King; but will not decide upon the merits of the various claimants.

THE *Italian Opera House* in the *Haymarket* having been consumed by fire in *June*, 1789, a patent for thirty-one years was granted to the petitioner to enable him to build a new house upon the site of *Leicester House* in *Leicester Square*, for the representation of *Italian Operas*; which premises he accordingly purchased for that purpose. He had no concern in the old house. Several *caveats* were entered against sealing the patent; one by Sir *John Gallini*, who had a share in the old \*house, was an incumbrancer upon it to a considerable amount, and had been manager: another by Mr. *Taylor*, who began to rebuild the old house, claiming as assignee of the remainder of a term of twenty-one years, of which thirteen and a half remained unexpired, for which term the premises in the *Haymarket* had been let to Mr. *Brooke* by Mr. *Vanbrugh*, tenant under the Crown. In this all the other creditors, except *Vanbrugh*, joined. There were two more *caveats* by the patentees of the Theatres Royal in *Copent Garden* and *Drury Lane*. The petition was for the application of the Great Seal to the patent.

Mr. *Mansfield* and Mr. *Lloyd* for the petition wished to hear the objections to it; conceiving it to be a rule, that, where a person applies for a patent, there is no necessity, that he should state a case in support of it; but that it is sufficient to answer the objections, which may be made to it.

Lord CHANCELLOR.

I never heard of such a rule. Persons applying for a patent must make out a proper case for it; and I must know, what the purpose of the patent is. Suppose it was to give authority to the *King's servants*, as they stile themselves, to exhibit any thing without check or controul; and that there could be no remedy but by *scire facias* for the abuse of it: it is not proper that any public exhibition should be established by the *King's* assent in this manner. I think, the person applying should

should lay a case before me. If it is to be under no controul, they may represent libels and indecent things. Many very indecent things have been lately represented on the stage here, of which foreign Courts have complained with great justice. It is very improper, that public exhibitions should be permitted here, which place foreign Courts and their transactions in a ridiculous light. I would not sign a patent, which did not put the parties under some controul, even though there should be no *caveat* against it.

1790.  
O'REILY,  
*Ex parte.*  
Court will not sign a patent, which does not put the parties under some controul; though there is no *caveat*.

For the petition it was then said, that the petitioner had purchased the premises at a great expence; and applied for a patent, and after such an expence a licence from year to year would be too precarious a tenure: that he was supported by the first people in the kingdom; and that the lease of the ground in the *Haymarket* would expire in thirteen years and a few months. \* But the Counsel for the petition offered to file affidavits, if the Court should think it necessary; and complained, that the affidavits on the other side were filed a very short time before the petition came on.

[ \* 114 ]

Lord CHANCELLOR.

You do not mean, I suppose, to leave your case there. Upon the other side, I suppose, it will be argued (and that will be the best way of arguing it) that the parties have been at a great expence upon the strength of a licence from year to year; and it would be a great hardship upon these people, who, induced by their reliance upon that, have laid out their property, and have lost it by accident. The only pretence for it is to give the public better accommodation, than they had before, and better than can be expected, after what has happened to the old house. It is like, what was attempted in Parliament lately, and was near succeeding, about a new Play-house. The King may, if he pleases, grant licences to twenty new Play-houses; and may give liberty to erect them in *Covent-garden* and *Drury-lane* close to those, which are established; but would it be right to do so? It would be a hardship on the parties concerned in the other houses, who engaged their property upon a reliance, that nothing of that kind should be done.

1790.

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O'REILY,  
*Ex parte.*

Essential to the complaint of an old market against a new one set up near it, that the old is competent to the accommodation of the public: so here the old proprietors must be able to keep it up properly; the accommodation of the public being the principal thing.

[ 115 ]

April 20th,  
23d.

done. I have a general idea, that it is like setting up a market near another market; and, that the principle of that case applies to this. It would be essential to the complaint in that case, that the old market was competent to the accommodation of the public, because otherwise they could have no right to complain: so here the old proprietors must be able to keep it up in a proper manner. This is more like a tenant-right. But if the Crown grants a patent, and induces people by that to lay out a great fund, it would be very wrong to grant a rival patent wantonly. The accommodation of the public is the principal thing to be considered. The circumstance of the lease having only thirteen years to run will be material, when it comes to be argued. But the petitioner must not be surprised; therefore let it stand over, that the petitioner may make a proper case, and file affidavits in support of it.

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The petition came on again upon the affidavits of the parties.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Richards*, for the petition.

The ground of petitioner's claim is, that the late *Opera House*, in which the possessor had only a term of thirteen years and a half, was overwhelmed with debt, so that it is impossible, it can ever be restored so as to make an effectual place of amusement for the public, such as they have a right to expect; since there is now no doubt, that an *Opera* is a proper establishment in this country. The consequence was, that *Gallini* and others turned their thoughts, to what was to be done. This produced the connexions between *Gallini* and the petitioner. They first fell upon a plan of re-building the house upon the old site, the term in which is subject to various claimants in various rights, so that it is much incumbered. Counsel having been consulted upon that project were of opinion, that no hope could be derived from that, unless under the authority of Parliament, to dispose of the rights of the various claimants. That opinion produced a petition to the House of Lords for leave to bring in a bill, which failed; and then these parties, thinking it would be advantageous to them

to



to build a new house, took up upon that opinion the project of building a new house on a new scite. It was impossible, this could be effected without the favour of the Crown to insure the parties such a permanent interest, as a patent would give them. The common way of conducting the business hitherto has been by licence from year to year by the *Lord Chamberlain*, merely to exempt the parties from the penalties in the act ten of the late *King*. The great funds necessary for this purpose could not be had without a permanent interest for the security of the lender. The *King* consented to grant a patent upon a proper piece of ground being purchased, and upon the interests of *Vanbrugh* being secured; both which have been complied with. At first a patent was proposed for twenty-one years; but that not being thought a sufficient security, application was made for one for fifty years; and at last it was granted for thirty-one years. Nothing could be done for effecting this purpose till the purchase of the premises, which took place in *December*, 1789. The plan was communicated to the *Lord Chamberlain*. Up to the agreement for the purchase *Gallini* and the petitioner acted together. The vendors were purchasers under a decree of this Court; the agreement was signed by them, and by the petitioner for himself and *Gallini*, with whom a copy was left. \* Some stipulations being required by the *Lord Chamberlain*, an agreement was drawn up as between him and them; a copy of this also was left with *Gallini*. It was understood by the petitioner, and, as he thought, by *Gallini*, that as between them it was perfectly settled: but *Gallini* refused to execute the articles, when they met for that purpose, though he had agreed to them, and had them in his custody a long time. The consequence was, that the treaty for the purchase of the premises having been completed, the petitioner was obliged to complete the purchase himself, which was for 31,550*l.*; and he has actually paid 8000*l.* for which he had given a note in his own and *Gallini*'s name; which he was obliged to get a friend to pay for him. The whole, to which he is made liable, is 38,000*l.* Upon this ground the petitioner applied for the patent himself. It has been granted, and is confined to *Italian Operas*, with proper restrictions to prevent improper representations, and from aliening without licence from the Crown.

Those,

1790.

O'REILY,  
*Ex parte.*

[ • 116 ]



1790.

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O'REILY,  
*Ex parte.*

Those, who now oppose it, contend with each other as much as with him. *Gallini* wishes, a patent should be granted; but insists, that he is entitled to a moiety. That your Lordship will not decide on this application. If he has any equitable claim on this, it is property as much as any thing else, and he may discuss his claim afterwards by a bill. The petitioner's Counsel has in fact approved the title.

*Lord CHANCELLOR.*

You mean the title under the decree of this Court. I do not doubt that: but my doubt is, whether any Counsel would advise his client to lay out money on this in respect to *Gallini's* interest.

For the Petition.

[ \*117 ]

It appears from all the affidavits, that *Gallini* shuffled in the business. They undertook jointly to make this purchase; and *Gallini* undertook to pay 8000*l.* by a certain day; and when called on to execute the articles, which were a long time in his possession, he refused, desiring till next day to consider, and then sent a positive refusal, declaring he would have nothing more to do with it; in consequence of which the petitioner became liable to all the expence, and has laid out a great sum in expectation, and upon the faith of the patent; and, though he is not in the habits of managing, he swears, he employs a man, \* who has been for years in the habits of managing these affairs. *Gallini's* conduct was an abandonment of his agreement; for it has been decided, that a written agreement may be abandoned by parol. But supposing it not an abandonment, that is no ground for refusing the patent; for his claim may be discussed afterwards. *Taylor* contends against him; for he is against any patent. It is hard to know, what he means. Pending and with a knowledge of all these transactions, and having a very trifling interest, he is proceeding to rebuild the old house. It is impossible for him to compel a renewal; and he can have no expectation of it; for *Vanbrugh* has assigned his reversionary interest with the usual expectation of a renewal to the petitioner; and has covenanted to endeavour to procure a renewal, and to assign that also: in consideration of which, and of his expending on the

the new house the sum of 3500*l.* insurance money on the old house, the petitioner has covenanted to pay him a rent of 1250*l.* a year; and to indemnify him against a covenant, by which he was under engagements to lay out that insurance money in rebuilding the old house, in case of any accident by fire. *Vanbrugh* then, the person materially interested, is satisfied. *Taylor* has an interest for thirteen years and a half; but considering, how it has gone on under his management hitherto, that it has long been a litigated concern, the load of incumbrances upon it, and the vast expence of opening it, it is impossible to be done. They cannot be serious in rebuilding it; for at the end of the term it will be to be left for those, who are entitled to the reversion. It is not reasonable to expect, that under such circumstances it can afford the public that entertainment, they have a right to expect. He has not stated, what means he has of conducting it better than before. It would be a mercy to them to determine their undertaking; for the debts amount to 70,000*l.*; which, even if the house was standing, could not be liquidated in the remainder of the term: but from *Taylor's* own shewing a large sum must still be borrowed; and, to judge from his former conduct, we must infer, that he will not be able to liquidate it in that time, when he proceeds to build another house, by which he must incur a considerable addition to this load of debt. It is practising on the credulity of the public, which a Court of Justice is bound to prevent. *Taylor* is the only person rebuilding the old house; and there is a person on the spot on the part of *Gallini*, giving the workmen hourly notice not to go on at their peril. This is the \*first time a question of this kind has come on; for such a patent was never before disputed in this manner; but the ordinary way was only to answer objections to it.

1790.

O'REILY,  
*Ex parte.*

[ \*118 ]

*Lord* CHANCELLOR.

All objections to it are open upon the *caveats*; and the propriety of it must be sustained in every particular. As to the agreement with the *Lord Chamberlain*, it is rather an odd measure: he is only a temporary officer; and his agreement must be executed by his executors and administrators, and by himself if out of office. The provisions in that agreement should

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O'REILY,  
*Ex parte.*

Patent, even  
in fee, could  
not stand, if  
abused.

[ •119 ]

should make part of the patent, not an agreement with the *Lord Chamberlain*, his executors and administrators: What have they to do with the regulation of a public establishment? The reservation of benefits to his executors must have been without his knowledge, and a mistake. But you do not connect the patent with the building; that may go one way, and the patent another. It has been wisely done hitherto to grant a license from year to year. The honour of the Crown and its compassion are concerned to continue it, unless it is abused. If the Crown choose to grant it during pleasure, which perhaps would be the best way, there they would, like other servants, depend for the continuance of it upon their good behaviour. Unless you lay before me such a patent, as will secure all the proprietors, I must advise the Crown against it. It certainly is not possible to grant it in its present form, and with that agreement with the *Lord Chamberlain*, which is absurd. The old patents of the theatres, granted to *Killigrew* and *Davenant* in the time of *Charles II.* were, I am told, in fee: but whether they were, or not, the patentees have not provoked an inquiry into them; and, I dare say, they will have too much discretion to do so: for, even if they were in fee, they could not stand half an hour if abused. I would not advise the Crown to extinguish property to the amount of 70,000*l.* or 80,000*l.* by granting a rival patent, unless there was misconduct, or unless the miserably entangled state of the property made it impossible for them to go on to the advantage of the public. But here they are going on, and at a great expence. However, if the *King* thinks fit to refuse a license; and sees no objection to that, I cannot enter upon it, because not referred to me. If you can get it into any other office than mine, it would be better; for I am very incompetent to decide on these affairs. If you will go to the *Lord \* Chamberlain*, who understands them, you will get a good judgment upon it. Here is an adventure subsisting under an annual license, which, I must take it, will be renewed; if so, I do not enter into the reasons of it; but while the *King* does continue that license, this patent cannot be granted. If the *King* puts an end to it, then you will stand on your own ground. I am amazed, that, meaning to conduct themselves properly, they should think, there is any difference between a patent and a license.

license. They have always been considered as the same. There is now a subsisting license for performing *Operas* at the little theatre in the *Haymarket*; which looks like an intimation, that they may go on, if they can. Suppose this had been a clear subject, instead of being loaded, as it is, with these incumbrances; and that it had belonged to one man, who was burned out, and applied to the Crown for a renewal of the license, undertaking to go on: I should suppose, not that the *King's* word would be absolutely engaged, but that the royal indulgence and compassion would be continued to him. If the *King* refused it, it would be upon reasons very unfit for me or for any one to dispute; because it rests entirely in his royal breast; and it cannot be in one more honourable. But while this license does exist, I must think, it will not be determined.

1790.  
O'REILY,  
*Ex parte.*

*Solicitor General* and Mr. *Mitford*, for Sir *John Gallini*.

The application is for the favour of the Crown to grant the petitioner a considerable advantage. There are two questions; first, whether it is proper independently of all other considerations; secondly, whether proper, considering the claims of others. The first must depend on the Crown and your Lordship's determination; as to the second, the grant of a fair or market cannot authorize *A.* to hold one upon the ground of *B.*: for the Crown will not by its grant injure the property of another. *Gallini* is importantly interested; he has a considerable interest in the old house; and has acquired a considerable interest in this property, proposed to be conveyed to the purposes of the new house. I cannot disavow, that he has paid more attention to the new concern, than was fair with regard to the old one: I do not defend that part of his conduct. Upon this case every reasonable attention must be paid to the public morals, and to the creditors of the old house. In another respect also *Gallini* is in a situation, which must give him some concern; because it is stated in the petitioner's affidavit, that the *King* had \*signified his will, that the patent should be joint; and that from a representation of certain facts afterwards *Gallini* is now thought unworthy of that mark of the royal favour. If the patent can be the subject of a trust, the petitioner must hold it as to a moiety for

[ \*120 ]

1790.

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O'REILY,  
*Ex parte.*

for him. Upon the same ground, if he chooses to call on the vendors for a conveyance of the premises in *Leicester Square*, he has a right, which cannot be repelled, as joint-tenant by the agreement. By putting him out of this concern they have cut from this application every merit, it had. By *Taylor's* affidavit it appears, the petitioner was clerk to a conveyancer. Upon *Gallini's* statement to him of the distresses, he laboured under in the management of the *Opera House*, this young conveyancer thought, he could extricate him from them. He has not stated, how the application for the act of parliament came to fail; but the reason is plain. They thought it probable, that an attempt to build a new house would be much opposed by the creditors of the old, and by *Mr. Vanbrugh* who had a most solid and substantial interest; namely, a reasonable claim to apply to the Crown for a renewal; such a claim on the beneficence of the Crown is a substantial interest. The petitioner then applied to the persons, who had purchased these premises in the Master's office, before the report was confirmed. They had been sold in this Court for 24,000*l.* instead of coming here to open the biddings, as he might have done, he agreed with them immediately for himself and *Gallini* for 31,000*l.*; and there is an express condition, that if any one goes to the Master's office to open the biddings, the 8000*l.* shall be repaid, and an end put to the business. *Gallini* disapproved several parts of the articles; and was much surprised at the penalty of 50,000*l.* *Gallini* swears, that *Mr. Bray* and *Mr. Sheldon* disapproved several parts of them; and the petitioner admits, they were at *Mr. Bray's* chambers; who, *Gallini* swears, advised him not to execute them. Upon this he refused to execute without the approbation of the two Counsel; and yet the next time they met, he was called on to execute those very articles, which were ready engrossed. Then they have recourse to the case of *Legal v. Miller*, 2*Ves.* 299, to prove, that a written agreement may be abandoned without writing; but the Court cannot say, that, refusing to execute the articles under such circumstances, he is therefore to be cut out of all his interest. This business has been carried on upon principles, which the Court in any other transaction would call corrupt; I mean in the sense, in which this Court uses the word: for in these instruments

Instruments there are considerations and agreements extremely singular. The lease to *Brooke*, who held as trustee for the creditors, obliges *Vanbrugh* to insure the premises for 3500*l*. He must, if he chose to call for his rent, have laid out to that amount in re-building; but he has expressly covenanted to abate his rent in the proportion of 19*l*. a week for *Brooke* to rebuild; and that the insurance money shall be applied to that purpose. Then *Vanbrugh*'s consideration from the petitioner is a share in respect of this insurance money, and a rent: the first is the property of the creditors; and as to the second, he barter his claim upon the benevolence of the Crown to secure his own interest. The petitioner indeed covenants to make good the claim of the creditors; but it was manifestly his intention, that that indemnification should be given to *Vanbrugh*, if he was compelled to apply the money upon the old premises; but that he should be compelled by all the tedious process of the law, before the creditors could recover this money. Under this agreement even the petitioner is concerned in the old house; for he is bound in certain circumstances to lay out 3500*l*. by being obliged to indemnify *Vanbrugh*, if compelled to lay out that sum. A great deal more has been given for this property than as mere landed property it was worth. If *Gallini* abandoned the agreement, that was for the benefit of the petitioner; and perhaps means have been used to make him abandon it. The original agreement had to a certain degree the interest of the creditors in view. The whole extent of those claims could not be provided for: it was necessary to sacrifice those more remote to those nearer: therefore *Vanbrugh*, the mortgagees, and *Gallini* were proposed to be first considered. The interests of those concerned in the old house were made the foundation of the application. By degrees the petitioner withdrew himself from them; and having, as he thought, prevailed on *Gallini* to abandon his claim on the new undertaking, applied for the patent himself; though still in his affidavits there is some sort of provision mentioned for the creditors. It cannot be supposed, *Gallini* meant to abandon a benefit, which he was to have independently of the other. The penalty of 50,000*l*. might attach upon *Gallini* much more than upon the petitioner, who is a mere man of straw without any property. The old pro-

1790.

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O'REILY,  
*Ex parte.*

1790.

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O'REILY,  
*Ex parte.*

prietors are carrying on the business at this time as much as possible at the little theatre in the *Haymarket* with the old scenery and materials, saved from the fire. If this patent passes, it will put an end to their annual license, which will be of no value. On the other hand the Crown certainly does not intend, there should be two *Opera Houses*: if not, the license must, from the moment this patent passes, be withheld from the little theatre, and the protection of the Crown withdrawn from the proprietors: one of them must drop.

Mr. *Graham*, for a class of twenty-four creditors by mortgage; who had subscribed 500*l.* each: 3000*l.* had been paid to them; so they remained creditors by mortgage of 9000*l.*

It is now sixty or seventy years, since *Operas* have been established in this country; and the common course of conducting them has been by annual license; which has impressed on the public an idea, not that the royal word was absolutely engaged; but that while there was good behaviour, such license would be renewed. The effect of that was, that numbers of people have been induced to engage their property in it. Nothing has happened, but the fire, which must necessarily have produced compassion in the *King*, instead of any change of his kindness to these people. There may be good reasons assigned, why the *King* should part with his controul over the play-houses for a considerable time; though perhaps, if that measure had been well considered at the time, it would not have been adopted: but it may be necessary in order to give that permanence, which will enable them to procure better entertainment for the public. But the *King* ought to keep the controul over *Operas* in his own hands; because it is so precarious. We all know the fate of *French Operas*: the whim of the town may affect *Italian Operas* in the same manner. Also, if they should become a more general amusement, instead of being confined to the higher circles, it might occasion a relaxation of morals more congenial to the *Italian* than the *English* character; and make it expedient to put a stop to them at once. The petitioner from his education is not likely to give satisfaction. He sets out by borrowing money, though he states his claim to be founded upon the embarrassed state of the

the



the finances of those, concerned in the old house. The only security, he could give, is upon his promised patent; therefore he disappoints the patent in the outset. Neither has he complied with the requisitions of the Crown; for he cannot be said to have purchased these premises. He may become insolvent; and then there is no one, \* in whom the patent could vest. He begins with a law-suit; for *Gallini* may come here immediately to have his right established for a moiety.

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O'REILY,  
*Ex parte.*

[ \*123 ]

Mr. *Hardinge* and Mr. *Hollist*, for Mr. *Taylor* and all the other creditors.

Nothing is required from those, who oppose the patent, but to shew they have an interest. There are two principles applicable; first, if a patent appears to have been obtained surreptitiously, and by fraud upon parties deeply interested in the property, that is a very solid ground for vacating the patent; therefore your Lordship will see, that a fair case be laid before the *King*: secondly, if there was an equal prospect of permanence, which I deny to be the case here, and an equal security in point of controul, which I also deny to be in this case, yet the circumstance of large property invested in this adventure upon the faith of its continuance, and of debts *bonâ fide* accrued, would turn the balance. From the fraud attempted this inference may be drawn; not only that the public would have ground in general to distrust such a man; but it goes to the point of permanency too; for the controul will not signify any thing to such a man, whose agreements are waste paper, and a mere nullity; as is this agreement with *Vanbrugh*. Observe how the petitioner has come in. *Taylor* and *Gallini* agreed to rebuild upon the old scite for their joint benefit: at this very time, according to the petitioner's account which is very doubtful, *Gallini* was engaged in a treaty with him for the purpose of excluding the proprietors of the old house. A difference arose about the sum to be allowed to *Gallini*. He wanted 15,000*l.*; *Taylor* would not allow him more than 12,000*l.*; and it was referred to arbitrators to say, what should be allowed him above the latter sum; and then for the first time comes the petitioner, who was only a clerk; and he talks of *Gallini's* cheating him, though they were to meet at the petitioner's chambers to discuss, what the sum should be, the



1790.  
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 O'REILY,
Ex parte.

[*124]

settlement of which was to put him for ever out of concern. He did not hint to these parties, that he was acting against them; and in the summer *Taylor* to his great astonishment was told of these circumstances. *Gallini*, being asked about it, said, he merely employed him with respect to the contract with *Taylor*; and the petitioner himself said, that he was only agent for *Gallini*; and that it was dishonourable to him to think * otherwise. *Taylor* surprised at this applied to the Crown, and was told by the *Lord Chamberlain*, that he was very sorry, he was too late; but that an actual promise had been made to the petitioner. He then heard, that *Gallini* was also left out. Thus it stands between these individuals but not *Taylor* only, but immense loads of property, and of the most respectable kind, are defrauded by this. *Taylor* has *bonâ fide* advanced 17,000*l.* or 18,000*l.* within four or five years; he says, he has improved the boxes from 5000*l.* 10,000*l.* a year: he is struggling for the interest of the other creditors embarked with him. Then what a fund of property is completely, and I will say wickedly, abandoned in this plan. For no one of these claims is there any provision made. The provision for *Vanbrugh* only makes the matter worse; for it is covertly to elude the other claims: what ground does he lay to shew, the establishment will be permanent? Only that he has great encouragement. There is no fund of subscription provided; but, he says, he will put it all into the hands of trustees. We have no idea of a patent; which is idle; but only wish to go on as before, with any additional controul that the Crown may think proper. The creditors stand on a better footing than the petitioner as to the chance of permanence and controul; and also have the merits; they have the complete assent of all the persons interested in the old house, not excepting even *Gallini*; for he has agreed to accept the reduced sum (70). Their plan will be satisfactory to all parties. It was formed by the committee of the creditors; there are trustees representing every interest, and a provision for every claim on the whole house. The whole demand upon it exclusively of the expence of building is 41,000*l.*; the expence of building will be 20,000*l.*; for which sum a man has engaged to have it ready by *January*. To answer this expence they have

(70) This was denied by his counsel.

have in hand insurance money to the amount of 8000*l.*; in Court 5000*l.*; and a quantity of scenery, furniture, and old materials saved from the fire to a considerable amount: so that the whole stock in hand amounts to 21,000*l.*; and by this arrangement no one claimant is injured. The petitioner has nothing: so that if the sum to be procured by the proprietors is 70,000*l.* or 80,000*l.* he would have to procure considerably above 100,000*l.*; and must mortgage his patent in the very outset. He states, that he was obliged to get a friend to advance the first sum of 8000*l.* It was necessary to begin to build immediately in order to have it ready by *January*. . As to the objection from the shortness of the term; the proprietors think, the agreement with *Vanbrugh* will turn out a fraud and a nullity: and hope, that if they go on with the good opinion of the public for thirteen years and a half; at the end of that time *Vanbrugh* will be glad to treat with them; by which time, it is probable, the petitioner will have absconded, and turned out a mere man of straw. He, who has nothing to stake, cannot have any interest but from day to day.

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O'REILY,
Ex parte.

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Mr. *Anstruther*, for the Patentees of the Theatre Royal, *Drury-lane*.

The only way, the Patentees of *Drury-lane* conceive their interest may be affected, is, that there is at present a licensed *Opera House* in the *Haymarket*; and, if this patent is also granted, there will be two; and then the places of public amusement will be more, than the town will require.

Mr. *King*, for the Patentees of the Theatre Royal, *Covent-garden*.

The Patentees of *Covent-garden* conceive, their interests may be affected, because the word "*Operas*" is mentioned in their patent in the enumeration of entertainments, they are authorized to represent; and in fact *Operas* have been performed there; particularly in the time of *Handel*; and they conceive, they have a right to perform them, if they choose. They do not however mean to insist upon the exercise of that right; but only wish the thing to on as before by license *from year to year* (71).

(71) Here the petition was *cellor* advised the Counsel for adjourned; and the *Lord Chan-* Mr. *O'Reily* to give up the patent;

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O'REILY,
Ex parte.

[* 126]

Reply.

The opposition made to this patent lies in a very narrow compass, consisting only of general objections, which might as well be made by any one else; not of any particular injury to * the parties opposing it. The petitioner after a long examination by the officers of the Crown has been considered as a proper person. It has been communicated to and approved by the *King*; in consequence of which he made himself liable to a great expence in the purchase, as a necessary previous step before the patent could be granted. There is no personal objection to him. Having so laid out his money, he applies of course for a patent. The grant of a liberty to carry on this entertainment is peculiarly within the pleasure of the Crown: his *Majesty* is capable of forming a complete judgment upon it; and it is a very improper subject to be discussed here by persons engaged in business of so different a nature. It is impossible, they can decide, whether a patent or license is the best mode of conducting it. But it is sworn, the persons, who are to advance money upon this (which he could not be expected to do himself) will not lend it on the security of a license. They would not even be satisfied with a patent for 21 years. Therefore a patent is necessary. But such patents have been granted in fee. Acts of parliament relative to such diversions all suppose a right in the Crown to grant such patents; though they do not expressly refer to them; whence it seems, that those even in fee were legal. The petitioner will certainly insert in his patent any other provision, *your Lordship* thinks fit. As to the ground, upon which the theatre is to be built, and the right of carrying on the entertainments being more connected, than they have been, it was intended in the articles, from which *Gallini* retracted, that the right to the ground should be conveyed to trustees for that purpose. But it is impossible, the two rights can ever be disunited; for no person would ever lend money upon it, unless he had a proper interest, not only in the house itself, but also in the patent. The provisions for carrying it on properly were to be by agreement with the *Lord Chamberlain*, his executors and administrators.

which

tent; and apply for a warrant but this recommendation was not followed. order to bring it before him:

which mode was adopted, as he is not a corporation; and therefore it could not be, as agreements with corporations are, viz. with them and their successors. From a view of the whole it seems, that unless a new house is built independently of those, who before the accident of the fire had ruined the old house, it is probable, there will be no such exhibition hereafter. *Gallini's* opposition, which is the principal, is certainly very extraordinary in objecting, that the interests of the proprietors of the old house were not sufficiently attended to; his interest being, we confess, *one of the first. His counsel admit, that he paid more attention to the new adventure, than he ought, consistently with the rights of the other proprietors. His affidavit goes to induce the Court to think, he ought to have a share in the patent; there is not a word in it of a provision for the creditors; though now by his counsel he represents, that some care ought to be taken of them: but it is impossible, if the new work goes on; for that would be ruined by the incumbrances, as a new house on the old site would be (72). *Gallini's* conduct justified the petitioner. Till the purchase of the premises was made a complete bargain, the patent could not be obtained: to do that he paid 8000*l.* of the purchase-money; then *Gallini* fell off for the reasons stated in the petitioner's affidavit; namely, because he did not like the provisions (73) for the *Lord Chamberlain*; nor the manner in which his own interest was secured; but he also said, he did not intend to have any thing more to do with it, nor with any operational concern. The petitioner applied singly; because he had reason to think, unless he complied with the conditions required, somebody else would apply. *Gallini* in his affidavit only says, that he was afraid of the penalty, and makes the other objections before mentioned; but does not say a word of *Vanbrugh*; though now he mentions his interest as the reason of his refusal to execute. There was nothing opprobrious in the petitioner's conduct to *Vanbrugh*. Seeing the ruined state of the house, (before the fire) he agreed to indemnify *Vanbrugh*

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O'REILLY,
Ex parte.

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(72) The *Lord Chancellor* here asked, if all the creditors had agreed; and said, he understood they had; and if so, though but for a shilling in the pound, it was but as the possession of one man: but Mr. *Mansfield* said, they had not all agreed.

(73) One was a power of giving orders.

1790.
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 O'REILY,
Ex parte.

Vanbrugh from his covenant, the effect of which it was impossible to prevent; if any one should be mad enough to insist upon the performance of it. The rest of the bargain was to pay him a rent. The *King* chose, that *Vanbrugh's* interest should be provided for.

Lord CHANCELLOR.

Then there was a consideration with respect to *Vanbrugh*, which did not apply to the rest.

For petition.

There was.

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Lord CHANCELLOR.

There is no evidence before me of any ill treatment of the performers; a very little would be sufficient.

For petition.

There is not now; but it has often appeared in this Court before.

Lord CHANCELLOR.

There are many considerations, which certainly will not rest with me to be determined upon this petition. The use, the *King* may derive from its having been before me, is, that the true state of that part of the case, upon which the *King's* judgment will turn, has come out more intelligibly, than it had before. All parties seem to agree, that an *Opera House* is a proper establishment in this country; but you will not expect me to determine, which of these plans is the best. The thing, that comes nearest to my office, is to see, that the *King* is not deceived; and that he does not throw out of his hands that authority, which ought to be retained. Many considerations require, that public establishments of this nature ought to be in the hands of the *King*; and the statute of *George II.* requires it. The patent certainly cannot stand in its present form; but if in other respects it is fit, it should be granted,

A patent must
 be taken under
 proper re-
 straints.

it must; but they must take it under proper restraints; for whoever takes a patent, must take it upon those terms. The contract with the *Lord Chamberlain* will not do as a check upon

upon them. Whatever is imposed, must be imposed by the Crown. The thing going nearer the heart of it, and which principally relates to my office, is to see, that the *King* is not deceived, nor his object disappointed. I take it, there were no such things as these antecedent to the time of *Charles II.* In the time of *James I.* as in that of Queen *Elizabeth* masks and such diversions were under the immediate direction of the Crown, executed partly by the *Lord Chamberlain*, but more immediately by the *Master of the Revels*. They acted as the *King's* servants: and *Charles II.* still preserved the same idea, when he gave a patent to *Killegrew* and *Davenant*: but instead of leaving it to the management of the menial servants of the Court, of which the *Lord Chamberlain* is certainly one, the *King* appointed other persons to execute it. It seems odd, if there was any thing to * be required in the person, who was to execute this, that it should be given to him, his heirs and assigns: but so it was given. Thus it rested till the time of Queen *Anne*: then the two companies either from a quarrel or some other cause were united. Then *Collier* and Sir *Richard Steele* got a patent; which is, I believe, the patent, which has continued down to this day; under which *Drury-lane* theatre is at present governed; but I do not pretend to speak with certainty about it: *Cibber's Apology* is the book, from which I have gained my information. They were entitled to exercise this notwithstanding the Act of *Vagrancy* and any other prohibition. But it came at last to be abused; for every one acted. Then came the statute 10th of the late *King*; which only reserved to the *King* the right of granting this liberty. Here it would be necessary to provide, that the patent and the property should be in the same hands; for from the account, the petitioner gives, I am afraid, the establishment in the house will go one way, and the right to the patent another. As to making a trust of the patent, there may be cases upon the subject; but I do not know any; nor do I know, whether the property in the house will draw the right to the patent after it. If they are at a great expence in forming a house, and afterwards the petitioner may choose, whether the patent shall be applied to it or not, it would be inconvenient; and the more they lay out upon it, the more he will be entitled to ask; for he will know, it will be so much the more for their interest to agree

1790.
O'REILY,
Ex parte.

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Quære, whether a patent can be the subject of a trust.

1790.

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O'REILY,
Ex parte.

[*130]

agree with him. This patent seems to be calculated to create more law-suits, than I can have any conception of; I can see a great many; but there will be many more, than I can form any idea of; and certainly it is not convenient, that such an institution, for which the *King* may provide, should be followed by such consequences. There was certainly no estate in the old house; not even what this Court would look upon as a tenant-right. It has been represented to his *Majesty*, that *Vanbrugh* has a right to expect a renewal of his interest. The *King* will be to decide, what specific difference there is between the expectations of *Vanbrugh* and of the other creditors; I think, they seem formed upon a ground very similar; for laying out a great deal of money in repairing and refitting, and in decorations and scenery, seems to constitute pretty much the same kind of claim as the original expence of buying the ground and building the house. But if the *King* has had that before him already, and thinks of it * again in the same manner, when it comes again before him, I certainly will not state that as an objection for me to make to signing the patent; but I must represent it to him as part of the proceedings. But I will take care of the other things; namely, that he shall not be deceived or disappointed. There is one point, to which you have not gone; that is, whether *Gallini* has a right to a moiety of this, or not. No one, I think, would purchase it upon the idea, that *Gallini* has no hold upon it.

For the petition.

That would depend on evidence. If he had said, he would have nothing more to do with it, or with any other operational transaction, I should think, he would be too late.

Lord CHANCELLOR.

Court some-
times takes the
management of
a brewery out
of the hands of
the parties.

The articles seem to me to be upon the manner of managing it. We have had cases in this Court upon breweries like it, to prevent one partner from destroying an adventure, which he had agreed to carry on with the other; and there I have even taken the management from them sometimes: but I hope, I shall not be obliged to order a Master to take the management of an *Opera House* into his hands; as I am sure, it would be
very

very unfit for him (74). My only care about it is, that my representation to the *King* may be fit for me in my situation to make. My present impression of it is, that *Gallini* was going on with the petitioner harshly, I do not say iniquitously, to press those, with whom he had a common claim: that they were obliged to dispose of the interest of one party in a different manner, from what they intended to do with the rest; and they have given *Vanbrugh* more, than what was due to him, and yet have refused the rest even what was their due. When there are incumbrances upon an estate beyond the value of it, if they agree even but for a shilling in the pound, it is then, as if it was the possession of one person. I shall represent it to the *King* as well, as I can: and in so doing shall not state any thing, which the affidavits do not warrant, without giving the parties an opportunity of hearing it: but I expect, that in the very short representation, which I hope to be able to make to the *King*, I shall not find it necessary to go out of them.

1790.

O'REILY,
Ex parte.

(74) Post: the cases of *Drury-lane Theatre, Ex parte Ford & others*, Vol. VII, 617: The Opera-House, *Waters v. Taylor*, XV, 10: The *Haymarket Theatre, Morris v. Colman*, XVIII, 437. In these cases the jurisdiction was maintained on the ground of partnership, and that it was impracticable to bring all the persons interested before the Court. See *Pearson v. Belchier*, post, IV, 627, and the note in page 628.

JACKSON, *Ex parte.*

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1790.

April 20th.

WELDON a trader died indebted to *Jackson*, leaving all his personal property to his widow. After his death the widow carried on the trade, and, having borrowed another sum from *Jackson*, in 1787 gave him a bond for the whole. Afterwards she took into the trade her son, being a minor, and her nephew *Weldon Gordon*, who before was her servant. The new partners did not bring any property into the trade; nor were they to have any of the profits nor bear any loss; but the nephew received wages as before. The partnership lasted almost two years, till in *December*, 1789, a commission of bankruptcy

A sole trader indebted by bond took in a nominal partner, but without fraud: two years after the partnership failed: that separate debt not permitted to be proved under the joint

commission, unless something, as payment of interest by both, to make the partnership liable; for which very little would be sufficient.

1790.

JACKSON,
Ex parte.

ruptcy issued against the widow and nephew, but not against the son. The petition was, that *Jackson* might be at liberty to prove his debt and receive dividends under the joint commission; the commissioners having refused to allow him.

Mr. *Mansfield*, for the petition.

The partnership was merely nominal (75); the nephew receiving wages just as before; so that she remained a sole-trader; and the debt arose on her bond only. There is no separate estate from the nature of the case.

Mr. *Mitford*, for the assignees.

We admit these facts; the difficulty is to admit the petitioner as a creditor upon the joint estate; who is clearly a separate creditor from the instrument, he took as a security.

Lord CHANCELLOR.

They have dealt ostensibly as partners a great while. I am afraid of breaking in upon the principle. The petitioner ought to have taken care, when he saw them going into this partnership. All the creditors must have brought actions against the partners. It is a hard case; and, if it had been sudden, would have been excessively so. But here two years have elapsed since the partnership; besides I do not know, that he was ignorant of it: indeed there is no pretence for saying, that he was. The *nephew has been liable to the debts of the trade; so that, if any accident had given him a fortune, he must have paid those debts. I cannot upon a sudden draw a satisfactory line, which, I am afraid, would be arbitrary, and shake the principle. I cannot apply it to this particular case; but must direct, that all the creditors may come upon the widow only. I cannot invent a good principle to decide it. There are ostensibly joint effects. It was intended probably to transfer the trade to the nephew and son, when the latter should be of age, and capable of managing it. I do not see any ground of fraud. I must take it, that his skill, and diligence in the trade were looked upon as an equivalent for making him a partner. In order to do this I must declare this man no trader, and consequently no bankrupt; that the trade was carried on by

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(75) *Ex parte Watson*, post, Vol. XIX, 450.

by the widow alone, and that he had nothing to do with it; for while I keep up the joint commission, I cannot grant this application; and know no other way, than by saying the nephew was only a servant and consequently no trader. If I can come at in any manner, I will. For that reason I asked, if any interest had been paid upon that bond by both: for if so, I should have considered it as adopting the debt, and making the partnership liable to it. Then I could do it consistently with the principle. If they have in any way considered the debt as a joint debt, I will understand it so, as it ought to be; for if one man having debts, takes another into partnership with him, a very little matter respecting those debts will make both liable. Let it stand over to see, if you can fasten it in any way upon both, which I should be glad to do.

1790.

JACKSON,
Ex parte.

MORRIS, *Ex parte.*

1790.

April 20th.

PETITION by bond creditors of a bankrupt for interest upon their debts subsequent to the suing out the commission, and an order of reference to the Master to compute it. They had received under the commission their whole principal, and interest to the time of suing it out.

3 Bro. C.C. 79.

[*133]

Upon a bankruptcy, there being a surplus after dividing to the amount of the whole principal with interest to the suing out the commission; subsequent interest ordered on petition of bond creditors saving just allowances: and Commissioners might give it without order; and need stop at nothing but

*Mr. Mansfield, for the petition.

There are many more debts due to the bankrupt to be called in; and the effects will be fully sufficient.

Solicitor General, contra.

There must not be a computation of interest upon interest.

Lord CHANCELLOR.

No (76): the whole must be computed as running interest; but it must be saving the bankrupt's just allowances. I think, the Commissioners might go on to do it without an order of the

(76) *Waring v. Cunliffe*, and the note, ante, 99.

want of assets. But no compound interest allowed.

1790.

MORRIS,
Ex parte.

the Court. It was disputed in *Evans's Case* (77), because the question there was, whether the interest should be computed beyond the penalty of the bond: but I should think, nothing need stop the Commissioners but the idea, that the bankrupt has not sufficient assets.

Mr. *Mitford* mentioned a case *ex parte Ridge*, 1788, in which a similar order was made.

Lord CHANCELLOR.

Costs refused.

Then take the order: but I will not give the costs of the application.

(77) *Bromley v. Goodere*, 1 *Atk.* 75. See post, 170. *Ex parte Mills*, Vol. II, 295. *Ex parte Clarke*, IV, 677. *Ex parte Rees* IX, 588.

1790.

April 24th.

After verdict on issue directed, new trial on account of having farther evidence to produce refused; there being no fraud [*134] or surprise, but the evidence having been kept back by the party applying: though the Court was much dissatisfied with the verdict.

STANDEN v. EDWARDS.

DEVISE of a real estate to be sold; and the produce with the residue of the personal estate as to one moiety subject to a life interest in his wife and her power of appointment, for all the legitimate children of *Charles Standen* living at his death (78). *Standen*, after cohabitation for seven years under one marriage, married again during the life of his first wife. There were children by both marriages. Upon an inquiry directed by the *Lord Chancellor* the Master reported *Charles Standen*, who was a son by the first marriage, *to be the only legitimate child. Upon an issue directed, *Charles Standen* to be Plaintiff, he obtained a verdict. The question as to his legitimacy depended on a doubt as to the due publication of banns previously to the first marriage. The only evidence produced to impeach the first marriage was the father and the register. A motion had been made for a new trial upon the ground, that there was more evidence to impeach the first marriage, than had been produced; but no circumstances of fraud or surprise were laid.

(78) The will is stated particularly, post, Vol. II, 589.

Mr. *Abbot* mentioned the point, as standing for the consideration of the *Lord Chancellor*; and in support of the verdict said, that no other evidence had been offered at the trial.

1790.

STANDEN
v.
EDWARDS.

Lord Chancellor.

I spoke to Lord *Kenyon* about it; and am left just where I was before. I had no doubt in my own mind, that the second marriage was good, and the first bad: but, as it depended on circumstantial evidence, I thought it a proper case for the consideration of a jury. There was evidence on both sides. The non-production of any farther evidence did not proceed from the imposition or controul of the Court, but from the discretion or neglect of the parties themselves; and in that case I cannot decide against the common rule of this Court, not to grant a new trial unless upon circumstances of fraud or surprise. It is wonderful, that in this case no circumstances of that kind can be alleged. I wish, that could be shewn; for the justice of the case calls loudly for re-examination. Here is a whole family rendered illegitimate by a mere accident. Yet certainly a father coming to bastardize his own issue, though a legal witness, comes forward under a cloud of suspicions. But what weighs with me now, is the rule of Court; on account of which, unless you shew, that there has been some surprise, I can do nothing in it: for I cannot permit parties to keep back their evidence at the trial in order to bring it forward afterwards, and to try it again with more advantage.

A father coming to bastardize his own issue is, though a legal, a very suspicious witness.

The *Solicitor General* again moved for a new trial upon affidavits: but, as they contained nothing new, and did not state any fraud or surprise, the motion was refused immediately.

June 1st.

The *Attorney General*, for the Plaintiff at law *Charles Standen*, moved for the costs of the issue.

[135]
Nov. 25th.

Lord Chancellor.

Whether costs are to be paid, or any thing else is to be done, ought to come on upon farther directions, not by motion.

1790.

STANDEN
v.
EDWARDS.

Mr. Abbot, for the motion.

Plaintiff at law could not bring it on, because they now would make him a party to the suit.

Solicitor General, contra.

He is not a party, because he was not so at first; but we were before the Master, though not a party, claiming to be a legitimate child. After he had obtained a verdict, I moved for a new trial upon very strong grounds. That is not yet determined. If the Court decides against a new trial, we must make him a party, because he has proved himself legitimate but not, if it is granted.

Lord CHANCELLOR.

I remember the case. The question, whether there shall be a new trial, must be first determined. A very strong ground was laid for it; if there had not been one of the strongest against it, which is, that a party, having evidence in his possession, would not produce it; but for that I should have granted a new trial: for though I cannot give an opinion of the verdict, I am very certain, the merits have not yet been before the Court. It would be extremely dangerous to let parties keep evidence in their pockets, and then say, that, produced, it would have such an effect. The question is only whether I can allow them to take advantage of it without laying down a rule, that will introduce fraud. It ought to be tried again, if this had happened by accident, and not *ex proposito*; that, having the evidence, they did not choose to produce it. I certainly did not decide it. I wanted a ground, upon which I could grant a new trial without introducing a rule that would enable parties, who meant fraudulently, to keep back their evidence, and then say, they have more witnesses. I should be much inclined to grant it upon a declaration that the evidence was not kept back *ex proposito*; otherwise nothing ought to induce me. I should be very sorry, for the sake of doing justice in one particular case, to introduce such a rule. But if you can lay a ground, under which I can possibly do it, I will (79).

(79) Mr. Beames has kindly communicated from a MS. note of Lord Colchester, that a new trial was afterwards granted upon new evidence, and to satisfy the conscience of the Court.

new

new trial granted, though the Judge certified in favour of the verdict: but it would be otherwise at law: *Stace v. Mabbot*, 2 Ves. 552. See *Pemberton v. Mackrel*, 2 Ves. 579.

Exhibits being found forged, the party not allowed to say, they are immaterial, and to go into other evidence; but the verdict is decisive. *Kemp v.*

1790.

STANDEN
v.
EDWARDS.

BUTLER v. EVERY.

1790.

May 5th.

3 Bro.C. C. 80.

THE bill was for an account of the rents and profits of all the estates, of which Sir John Every died seised, and for a discovery of Defendant's title. It charged, that Sir John Every in 1779 died seised in fee of several estates in Derbyshire and elsewhere, and intestate: that he left no heirs *ex parte paternâ*: that Plaintiff was heir *ex parte maternâ*: that upon the death of Sir John some person, having no right, entered, claiming as heir *ex parte paternâ*, and calling himself Sir Edward Every; from whom Defendant claimed. Defendant pleaded, that upon Sir John's death Sir Edward entered upon the lands, messuages, farms, &c. claiming as heir at law of Sir John, and was thereof forfeited (80): that in 1780 a fine with proclamations was levied between Cooke, defendant, and Sir Edward Every, deforciant, of all the estates charged in the bill, and of all the estates of inheritance, of which Sir John died seised in fee: non claim for five years: that Sir Edward died in 1785; and Defendant had been in possession ever since. The plea came on to be argued at the sittings before Hilary before Mr. Justice Buller and two Masters sitting for the Lord Chancellor; when two formal objections were made to it: first, that in stating the entry of Sir Edward after the death of Sir John, the plea omitted the word "said" before the words "lands, messuages, &c.:" secondly, that in stating the fine levied, &c. the word "said"

To a charge in the bill, that A. died seised in fee of estates in Derbyshire and elsewhere, plea of fine of all the estates charged in the bill, and of which A. died seised in fee, sufficient, without averments that they were in Derbyshire, and none elsewhere.

Court will not intend, that there are advowsons, merely because mentioned in the fine.

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(80) It appears in *Dobson v. Leadbetter*, post, Vol. XIII, 230, that this plea had not a distinct, positive, averment of seisin; and for want of such averment the plea is there over-ruled.

But both Lord Thurlow and the counsel appear to have conceived, that this plea did contain a sufficient general averment of seisin.

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was omitted before the name of Sir *Edward* Mr. Justice *Buller* was of opinion, that the word "*sa*" "*same*" was implied upon the whole; but, one of the M entertaining some doubts, it was agreed, that the plea be amended in those particulars; which was done accordingly. It came on again upon other objections to it.

Mr. *Mitford* and Mr. *Johnson*, for Plaintiff.

This plea is still defective both in substance and form. It is to the discovery of all the material parts of the bill, and an end to the claim of Plaintiff Defendant sets up a strict bar; *viz.* a fine and non-claim for five years; by which statute has attached upon it. That plea must be justified strictly. It is incumbent upon Defendant to shew, that it is impossible for Plaintiff to set up a claim in any way to any part of this estate. The plea ought to state fully, that the estates in the bill mentioned were conveyed by the fine: but it does not state the county, in which the fine was levied. The claim in the bill is, that Sir *John Every* died seised of lands in *Derbyshire* and elsewhere; and there are no averments in the plea, that the lands, of which the fine was levied, were in that county, or that there were none elsewhere. In one part the fine operates as a bar; part of the estates, of which the fine was levied consisted of advowsons in gross: Defendant alleges no prescription, and consequently no seisin, without which a fine cannot operate; therefore as to them it cannot operate as a bar. Then the plea being entire must be over-ruled: for it is to the discovery of the pedigree and every thing. If therefore Plaintiff is entitled to a discovery of these advowsons, the plea cannot stand.

Mr. *Mansfield* and Mr. *Graham*, for the plea.

No such thing appears upon the bill, plea, or answer, of an advowson in gross. The fine was levied of the manors in three different places; and the advowsons were appendages to two of those manors; but there is not a word of an advowson in gross. As to the other objection; here is a fine levied of all the land of Sir *Edward Every*. It is pleaded exactly as a plea at law. To what purpose should the county be mentioned? Plaintiff states, that Sir *John* died seised in fee.

estates in *Derbyshire* and elsewhere: the answer is, that a fine was levied of all such premises, as he died seised of, and as are charged in the bill. It must be to be sure upon writs of covenant, which might be different, if there were different counties; but here only one is mentioned in the bill; and the plea mentions, that one fine was levied of all the estates mentioned in the bill, and of all the estates of inheritance of which Sir *John* died seised in fee. All the averments amount to saying, there were no lands except in *Derbyshire*.

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Their saying "*all he died seised of*" is an admission, that part was in *Derbyshire*, and part elsewhere; consequently that one fine must have been erroneous; for a single fine cannot operate on any other county than that, in which it was levied.

Lord CHANCELLOR.

Why did you not take issue on that part of the plea, which says, the fine was levied of all Sir *John* died seised of? Suppose Defendant had begun by saying, all the lands, he died seised of were in *Derbyshire*; and that a fine was levied of those lands; and so concluded. The plea is, that a fine was levied of all the lands, Sir *John* died seised of: and though the county is not mentioned, it leaves it to Plaintiff to shew, there were lands not covered by the fine. Is it not tantamount to saying, that he had no other lands, and that the fine was levied in the county of *Derby*? The other would have been the more formal way. As to the advowsons, Defendants say generally, they were seised of all. What would you have them say more upon an advowson, than that they entered, and were thereof seised? They need not allege a presentation. Defendant avers entry and seisin of all, that is mentioned in the bill; and then Plaintiff would pick out of the catalogue of all the different descriptions contained in the fine. I do not know even, that there is an advowson. Fines are levied by all the descriptions of names, that can be thought of, in order to take in every thing. It does not follow, that there is a Court leet or a Franchise, because they are mentioned in the fine. The fine will cover it, if there is; and there is no harm, if there is not.

Fines are levied by all descriptions of names to take in every thing: and no objection, that any

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thing described was not really included.

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Plaintiff cannot on motion dismiss his bill without costs on the ground, that the Court would have decreed according to it, unless consent.

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ANONYMOUS.

MOTION on the part of Plaintiff to dismiss without cost a bill for an injunction from taking judgment at law and for delivering up deeds to be cancelled.

Solicitor General, for the motion.

From the facts in the answer it appeared, that though, the suit had gone on, this Court would undoubtedly have ordered the * delivery of the deeds, yet there was a more summary way of effecting it in the Court of King's Bench; which have accordingly ordered it. The ground of the motion is that this Court would have ordered it. Nobody appears to oppose it.

Lord CHANCELLOR.

I am afraid, it is beyond the course of the Court. You may set down a cause upon bill and answer; and either have a decree, or have the bill dismissed with or without costs according to the justice of the case. Though they do not appear to oppose it, yet if they do not appear to consent, you are in as bad a way. You may dismiss your bill with costs, if you please (84).

(84) *Dixon v. Parks*, post, *Brown*, 2 Bro. C. C. 186. *Beam* 402. *Fidelle v. Evans*, 1 Cox, 27. *on Costs*, 183, 184, 229. 1 Bro. C. C. 267. See *Knox v.*

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M'CAULEY v. COLLIER.

Quære, whether affidavit of notice must state positively, that the person served acts as clerk in Court; or whether upon information and belief is sufficient.

ON a special motion for Plaintiff the affidavit of notice stated it to have been to the person, "*who, as deponent is informed, and believes, is Clerk in Court for Defendant.*"

Lord CHANCELLOR.

I doubt, whether the affidavit is not too short. It ought to state, that the person, on whom notice was served, acts as Clerk in Court, and not upon information and belief. I think this

that is the form (85). It struck me, because it could be known immediately by applying at the public offices. Let the practice be inquired into. It is only a defect in form; and the only consequence will be to amend the affidavit. There is no doubt, they have had notice.

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(85) The precedents are the other way. See 1st *Harr. Chan. Pr.* 70, 4th ed. and *Hind's Chan. Pr.* 473.

MOTTEUX v. MACKRETH.

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MOTION to withdraw the replication, and amend the bill by striking out the name of *Dallas* as a Plaintiff, and making him a Defendant, upon terms of amending Defendant's copy, and not requiring any farther answer. The bill was brought by several annuitants, of whom *Dallas* was one; but he was also the only witness to some of the securities of the annuities; and the object of the motion was to obtain the benefit of his evidence.

Mr. *Hollist* opposed the motion.

Lord CHANCELLOR.

It must be by consent; but what can you get by opposing it? They can attain the end by filing another bill; and you will only put them to all that expence.

Mr. *Hollist*.

The fact is, there is no fund to pay these annuities; and therefore it is resisted, because it is probable, as that is the case, they will not file another bill. Defendant must have the costs of so much of the bill, as relates to *Dallas*.

Mr. *Mansfield*, for the motion,

Agreed to give those costs; and said, the shortest way would be to permit him, though a Plaintiff, to be examined.

Mr. *Hollist* said he could not consent.

Evidence of a Plaintiff being necessary, and Defendant refusing to consent to his examination, the bill on motion amended by making him a Defendant, and replication withdrawn, on terms of costs, amending Defendant's copy, and requiring no farther answer.

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Recommended him to advise his client to consent; and made the order *de bene esse* for that purpose.

Upon the 11th *June* the order was made as at first moved; the Defendant refusing to consent to the other proposal (86).

(86) Post, *Lloyd v. Makeam*, Vol. VI, 145, upon the authority of this case. *Tappen v. Norman*, XI, 563.

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May 12th.

HOCKLEY v. MAWBEY.


3 Bro. C.C. 82.

Testator gave a legacy to his son, an estate in fee to a nephew; then several parts of his freehold estate, and a future purchase of freehold, to be made with part of his personal property, and all his leasehold, to his wife for life, then to his son and his issue lawfully begotten, or to be begotten, to be divided among them,

JOHN RUSSEL by will gave a legacy of 1000*l.* to his son *Richard Russel*, and an estate in fee to a nephew; and then directed his executrix to lay out 2000*l.* of his personal property in the purchase of freehold estates within twelve months after his death. Those estates to be purchased, four messuages in *Johnson's-court, Fleet-street*, some others in *Bermondsey*, and the reversion of others elsewhere, (describing them all) and all his leasehold estates, he gave his wife *Rebecca Russel* for life; and from and immediately after her decease to his son *Richard Russel* and his issue lawfully begotten, or to be begotten, to be divided among them as he should think fit; and in case he should die without issue, he directed, that all, as well his *present* freehold and leasehold as the estates directed to be purchased, should be sold; and the money arising from the sale, should be divided among the children of his brother *Russel*, and of his sisters *Willis* and *Parks*, equally, share and share alike. There was a subsequent direction, that no part either of his *present* freehold and leasehold, or of the estates, so directed to be purchased, should be sold during the lives of his wife and son. All the rest, residue, and

as he should think fit: if he die without issue, all as well present freehold and leasehold, as the estates to be purchased, to be sold; the produce to go over. No part of his present freehold and leasehold, or the estates to be purchased, to be sold during life of wife and son. All the rest, residue, and remainder of his property and effects whatsoever and wheresoever, after paying debts, &c. to the wife. The son is tenant for life: and the devise over is good; but estates not mentioned do not


and remainder of his property and effects whatsoever and wheresoever, after payment of debts, legacies, and funeral expences, he gave to his wife for her own use and benefit for ever; and appointed her his sole executrix. The wife enjoyed under the will for her life; and after her death the son enjoyed for his life, and died without leaving issue. The will was established by a decree. The Master reported, that the testator left other estates, besides those specifically mentioned in the will; and that the sum of 2000*l.* had not been laid out, as directed by the will. The cause came on upon the report for farther directions. The questions were, first: whether *Richard Russel* the son took an estate tail or for life under this will: secondly: whether the estates, not specifically mentioned, would go to the residuary legatee; or whether they would be carried by the word "*present*" in the devise over: thirdly, whether that executory devise, there being no preceding estate to support the limitation over of the estates, * not mentioned before, as a contingent remainder, and the limitation over of the personal, were not too remote; being limited after a general dying without issue.

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Mr. Mansfield and *Mr. Mitford* for Plaintiffs the children of the testator's brother and sisters, and other parties in the same interest.

The words "*dying without issue*" cannot prejudice these parties; but must be restrained to dying without issue at his death; though he has not used those restrictive words. From those he has used, it appears, he meant this to take place after the death of his son: but to put it out of doubt he afterwards directs, that there shall be no sale till after the death of his wife and son. So upon the whole it is simply a devise to the wife for life, to the son for life; if he had children, then they were to take it, as he should direct; or equally, if no direction; and, if no children, to these nephews and nieces. As to the word "*present*," though the testator omitted by chance to dispose of certain other estates, yet, unless there is something to restrain that word to the particular estates before mentioned, it will include all, of which he was seised at his death; and if so, these nephews and nieces are entitled to the produce of them according to the directions of the will. There is no-
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thing to restrain that word. A point is made by the answers; namely, that the money arising from the sale was to be divided among such children of the brother and sisters, as were living at the death of the son; but such a limitation to all the children will comprize all alive at the death of testator; and will vest an interest in those, who die before the event. He intended to provide for his wife by directing, that particular parts of his freehold, and all his leasehold, should go to her for life. In that clause, which gives it over to the issue of the son, he could not mean, they should take by succession, because they could not so take: he must have meant, they should take as purchasers. He describes the freehold partially, and the leasehold by the word "*all*;" therefore his intention was not the same as to both; but he intended to take part out of one, and not out of the other. If he had meant the same as to both, he would have repeated the same words: by introducing new words, which in their usual sense would comprehend the whole of his property, he declared a new intention to comprize, what * was not before disposed of. So the subsequent words directing no sale are in the same extent applicable to all. But supposing the son took an estate tail, yet as he has not suffered a recovery, the subsequent limitation would be good. As the executors of the son have admitted assets, that sum of 2000*l.* must be paid out of his estate.

Mr. *Lloyd* for *Mary Russel*, a Defendant in the same interest with Plaintiffs.

The limitation of the 2000*l.* is clear; also that of the freehold estates, as no recovery was suffered. As to the leasehold, he could not, if it had been freehold, have taken an estate tail. When a testator gives an estate to a person and his issue lawfully begotten, or to be begotten, to be divided equally among them, or as devisee thinks fit, nothing can be more contrary to the intention than to suppose him to take an estate tail; for the consequence of that would be, that the eldest son would take the whole from him by descent: but he certainly must have intended from the words "*to be divided, &c.*" that two or more should take. In this case, if the son had left children, and had made no appointment, his children by the words of the will would have taken this estate equally between them. That

was determined by your Lordship in *Maddoc v. Jackson* (87), 2 Bro. Ch. Ca. 588, upon consideration of the case 2 Vern. 665, and of *Maddison v. Andrew*, 1 Ves. 57: and I have a manuscript note, which I have compared with the *Register*, and find it accurate, of a case before the *Lords Commissioners*, 12th February, 1777: *A.* devised to *B.* and his heirs male equally to be divided between them, share and share alike: *B.* had four children; and though the limitation was not to him for his life (88), yet the Court thought, the true construction was to give him the interest only; and the principal to be divided among his heirs male equally; and decreed accordingly. This is in point to shew, the son only took an estate for life; and it is stronger than the present, because "*heirs male*" are stronger words, than "*issue*."

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Solicitor General and Mr. *Selwyn* for the devise and executors of *Richard Russel*, and a grantee of the wife, Defendants.

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The son was entitled as heir at law to the wife, to whom every thing, not particularly mentioned, passed by the residuary clause. The word "*present*" meant not those estates, of which he was in possession at the time of making the will, as contradistinguished from that, directed to be purchased; but only those, devised to the wife for life, remainder to the son. The direction, that there should be no sale, confirms that construction: for the estates not mentioned were not comprised in the wife's life estate; if so, they passed to her by the residuary clause; and it is very odd, that he should give that direction about them, if he meant to exclude them: and the word "*present*" cannot have a greater extent in one part of the will than another. In the beginning of the will he gave a freehold estate to his nephew, and another to another person; which is an additional reason to shew, that in using that word he meant only, what he had mentioned before, in opposition to what was to be purchased. Besides as to the leasehold; if he had stopped

(87) That case, it has been observed at the Bar, turned upon a point wholly collateral; though there was some discussion upon that, which is the subject of the Report.
(88) *Law v. Davis*, Fitz. 112, cited by *Ld. Hardwicke*, Amb. 11.

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stopped at the word "*begotten*" it would have been an estate tail; and the limitation over, being of personalty, would be too remote: and the next clause, saying, "*if he dies without issue*" generally, would give him an estate tail by implication; and he was aware, that "*issue*" was a more general word than "*children*;" for in the devise over he has used the latter word. He meant therefore, that those in remainder should not take till after an indefinite failure of issue of his son. Suppose at the son's death he had left grand-children, or great grand-children, but no children; they would have been objects of his appointment; for they would have fallen into this description, and he might have appointed among them all, as he thought proper. Let the issue be ever so remote, they would fall into this description as objects of his bounty; and then it does not fall within the class of cases alluded to; for in those, it seems, the personal representatives of the children would take; and not the children of the children. There is no case in point.

*Lord* CHANCELLOR.

That case before the *Lords Commissioners* is very strong.

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For Defendants.

There is no case exactly like it. A great number of the cases have gone upon the word "*leaving*" (89); a great number more upon the word "*then*" (90); which have been construed to mean at the time of the death. Neither of those words is here; therefore it is too remote, being after an indefinite estate tail. There is no case, where it is said upon the words "*issue lawfully begotten or to be begotten*" generally, that it means issue at the time of the death, because there was a power of appointment among the issue, according to the proportions of which they were to take (91). The circumstance

(89) *Forth v. Chapman*, 1 P. 2 Atk. 308, and *Garth v. Baldwin*, 663. *Atkinson v. Hutchinson*, 2 Ves. 661.

*son*, 3 P. Will. 258.

(91) In *Target v. Gaunt*, 1 P.

(90) This construction of this word was denied by Lord Hardwicke in *Beauclerk v. Dormer*, Will. 432, the general words "*dying without issue*" were confined; because there was a power of



cumstance of his not exercising that power, which he had as mere tenant in tail, will not prevent your Lordship from saying, that he was tenant in tail.

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Mr. Partridge and Mr. Graham, for the heir at law.

No more passed to the wife and son under the clause, in which the estates were specifically mentioned, than what was so mentioned. The Court will give effect to the intention, if it can be found, and to every part of the will, if it can be done. It appears, he had in his own mind suggested to himself what particular part, he should give to his wife and son; and therefore seems to have determined to dispose of a particular part of his property. He must have known, that he had the rest by him; therefore the obvious construction is, that no more, than what was mentioned, should pass. He seems to have had it in contemplation to provide for the son during the life of the wife; for he gave him a legacy of 1000*l.*; he also gave an estate to a nephew: those parts were in his contemplation: therefore what was to be divided, was certainly only, what was to be purchased, and the particular messuages described. It is not likely, he intended a greater share to the children of his brother and sisters than of his own son. The word "*present*" must be qualified as applicable to the estates pointed out \* before. The construction contended for by Plaintiffs would make that word comprize also the estate given to a collateral relation in fee. It is clear, that there was no specific devise to the wife for life or to the son in tail of the estates not mentioned before; one of which was necessary to support the contingent remainder to those claiming on the death of the son. The wife was not designed to have a life estate, except in what was mentioned, in which she had a life estate expressly; and shall she have it by implication merely to support this remainder? But it is said, it may take effect by way of executory devise, by construing the words "*after the death of the son without issue*" to mean "*issue living at his*"

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of appointment among them. *patrick*, Vol. XIII, 476. *Barlow*  
For reference to the numerous *v. Salter*, XVII, 479. *Elton v.*  
authorities on this subject see *Eason, Donn v. Penny*, XIX, 73,  
post, *Everest v. Gell*, 286, and 545. 1 *Mer.* 20.  
the note. *Kirkpatrick v. Kirk-*



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"*his death*:" but there is no reference to the time of the death; though the direction, that there shall be no sale, &c. affords an argument, that that was the time meant: it must therefore mean an unlimited dying without issue. He meant, that the son should have nothing during the life of the wife, except the legacy given before, and by directing that these remainders should not take effect, unless the son should die without issue, he meant, the issue should be provided for after the death of the wife and son. Unless the word "*present*" is confined, the whole of the residuary clause is nugatory; though conceived in the most general terms; for he even uses the word "*effects*." Upon the whole he intended to parcel out the estates, he has mentioned; as to the rest, he is totally silent. He knew, how in technical words to settle on the wife what he intended for her; and, if so, it is very odd, that he should leave the law by implication to dispose of the rest; which must be the case, if the word "*present*" is construed the other way.

## Reply (92).

It is impossible to give a rational construction to the whole of this will; because there is an omission, though testator thought, he had mentioned every thing. It is very odd, that he should order a part of his personal to be laid out for his wife for life, and yet give her by the residuary clause an estate in fee at the same time. He could not mean that. He meant to give all his real in the same manner; but has made an omission, which the word "*present*" will supply. To the objection, that he had given other estates particularly, I answer, that that word means \*all, he had not disposed of otherwise. The words in the residuary clause are general; by which he did not mean any thing; but thought, he had disposed of all in the same manner. The words "*die without issue*" generally would give an estate tail by confining the estate in fee; and would therefore support the contingent remainder: but if not; it would do by way of executory devise; because it must be taken to mean issue living at his death, with reference to his power of appointment; and there is nothing forced in this construction.

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(92) The Lord Chancellor desired the counsel to confine himself to the point upon the construction of the word "*present*."

Lord CHANCELLOR.

The question upon the first part of the will, abstracted from the other question upon the construction of the word "*present*," which I will consider afterwards, is, what estate the testator intended, and, I think, has pretty plainly expressed, a contingency with a double aspect; in one case to the children of the son; in the other to the other persons pointed out; to the children of the son in one way; to the other parties in another; *viz.* by settling it so as to distribute it among the great number of persons, who might come within that description. The limitation to the son and his issue would be an estate tail; and perhaps the aptest way of describing an estate tail according to the statute: but it is clear, he did not intend it to go to them as heirs in tail; for he meant, they should take distributively, and according to proportions, to be fixed by the son. It has often been decided in other cases (93), besides those mentioned at the bar, that, where there is a gift in that way, the parties must take as purchasers; or there is no other way for them to take. The immediate consequence of that is, that *Richard Russel* the son could only take for life (94) and the consequence of that is, that this is a gift to the wife for life, then to the son for life; and after to his issue in such distributive shares, as he should appoint. It is then said, that this may be interpreted to be a gift to the son in tail with a power annexed to raise a future use upon it of the description mentioned. As to that I apprehend, that, in

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Heirs or issue, where intended to take distributively, must take as purchasers.

(93) In *Doe v. Laming*; where one of the grounds of decision was, that it was given distributively, 2 Burr. 1110. In *Doe v. Hyde*, 1 T. Rep. K. B. 593, the same mark of intention prevailed to prevent the first devisee from taking the whole term; and the same construction was made in *Wilson v. Vansittart*, Amb. 562: but in *King v. Burchell*, Amb. 379, more fully reported 4 T. Rep. B. R. 296, n. though the

remainder was given to the issue and his and their heirs share and share alike, it was determined by Lord Henley to be an estate tail.

(94) The cases shewing, what sort of intention is required to prevent the operation of the rule in *Shelly's Case*, and how far it can prevail for that purpose, are collected, in 1 P. Will. 4th edit. 142, n.

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Gift to A. and his issue to be divided among them, as he thinks fit; the issue have an interest in all events; and A. has no authority but as to the proportions. If no appointment equally.

Where to be divided among issue, the proportions must not be illusory. "Issue" will extend to any remote degree as a description of objects of the power of A. to distribute among them, as he thinks fit; but they must all be in existence during his life.

in case there had been children of the son, it was not intended to be left in his power to determine, whether he should or should not consider it as his own, and raise a future use, if he pleased; but the disposition gave an interest to his children; and a title to insist upon an estate in the premises to be given at all events: and then the son has no authority but as to the proportions, in which they were to take; but not to choose, whether any thing should be given to them or not. Then the effect is like all other gifts to persons in remainder capable of being divided; but if not, equally: and that is the necessary consequence of the supposition, I mentioned before, that he intended to vest an interest in the children of his son independently of the son, except as to the proportions; and that even so, as that they should not be illusory (95). It was observed, that the word "issue" would extend to grand-children (96) or any other degree of kindred, however remote. I think, it would be so; but only in this point of view; as a description of the objects, among whom the power of the son was to obtain, to make such partition as he should think fit; and whosoever they were, they must be in existence during the life of the son; and he must have made it during his life; if so, it is of no consequence, how they were described; for, if it vested in them, it is of no consequence to say, they were not the immediate descendants of the son. It is an estate devised upon two alternative contingencies; one, that there were objects capable of taking under the first limitation; another, that there were none such, but that there were objects capable of taking under the second. As to its being an estate tail by implication, it is contrary to reason and to common sense to impute that intention to him, if only arising from his not having made a special devise of the estate in that form. The estate he was directing to be sold, and the estate supposed to be given to the son in tail, were the same; and if so given, it could not be sold by this power; and does not come within the range of what he had before directed. It is plain therefore,

(95) 1 Ves. 59. 2 Ves. 640. 79, all the authorities on the subject of illusory appointments are collected. *Boyle v. Bishop of Peterborough*, post, '299. *Vanderzee v. Aclom*, Vol. IV, 771. In *Butcher v. Butcher*, IX, 382, 1 Ves. & Bea. (96) 3 Term Rep. K. B. 372.

wherefore, he did not intend an estate tail; and I am clear upon that point. The next question is, as to what the extent of this devise shall be. He had given some part in fee, others for life, but more particularly one, not then in existence, but to be purchased with 2000*l.* of his *personal*. To give the natural sense to the word "*present*" it means no more, than in opposition to what was to be bought; those were the two objects, that were to be described by the words "*present*," and "*what was to be afterwards purchased*." But it is contended, that the word is capable of a more extensive sense. Certainly in the obvious interpretation to be given to it, if found in a will, and there is nothing else to controul it, it would be extended to all, he had; that is, all he could devise. But the word has received a different construction from the context upon the whole, and also from the observations made at the bar, that there were other estates, to which it would apply, if meant in its most extensive sense; but which he could not intend to comprehend in it; and therefore it must be construed so as to prevent its application in that manner. If it was a phrase of force sufficient to carry along with it such a positive signification, as could not be changed, that could not be done: but it is not a phrase of that force. He has used it in two different parts of the will; in both it must mean the same thing. He has directed a sale after settling the actual and expected uses, to which he had destined the property. He says, "*my present freehold as well as that to be purchased shall be sold*" upon such events: and when he had directed it to be sold upon those events, it was not necessary to put in that direction, that it should not be sold except upon those events: but that was as a corollary in his mind. The true sense of the word is, the estates he had enumerated, as put in contrast with what he had directed to be purchased. It is said to be strange to give part, and particularly an estate to be purchased afterwards with part of the personal property, to the wife for life; and then all the rest to her absolutely in fee: but there is nothing in that so repugnant to the general meaning of this will as to reason upon it: for it was necessary

1790.

HOCKLEY  
v.  
MAWBEY.  
[ \* 151 ]

Particular estate considered to be given for

the sake of limitation over. Residuary clause is a mark of intention; but not sufficient ground to say, it was absolutely the intent, that there should be something to satisfy it.

1790.

HOCKLEY  
v.  
MAWBEY.

[ \* 152 ]

to limit her estate, if he intended to give it over to any other person (97). This construction is aided by the last clause for though a residuary clause cannot be carried so high as to determine, that it was absolutely in his intention, that there should be something to satisfy it; yet in the context of a will it is a mark of intention. The residue is given very general by the words "*whatsoever and wheresoever*;" which \* shew he meant real as well as personal property. But he has gone farther by using the word "*effects*." He relates as well to the situation as to the quality and kind of the property; and it is impossible to reject those words, so as to say that it was not in his contemplation, that there were other estates, which might be so disposed of. Those must be considered as disposed of by the residuary clause; and the rest must be sold and divided among these children (98).

(97) The same construction, 114. 2 *Vernon*, 648. 1 *Eq. Ab.* that the estate for life was given 245.  
for the sake of the limitation (98) *Jeffery v. Honeywood*, over, was made in the *Duchess 4 Madd.* 398. *Hodgson v. Merest*, of *Beaufort's Case*, 1 *P. Will.* 9 *Pri.* 556.

1790.

June 1st.

On an issue from Chancery original answer not sent down to the trial, whether between same parties or not, till after refusal of the office copy as evidence.

## ANONYMOUS.

**M**OTION to have the original answers of Defendant sent down to trial at Nisi Prius instead of office copies, as usual.

*Solicitor General* and Mr. *Mansfield*, for the motion.

It is apprehended, the office copies will not be admitted as evidence at the trial; though it has been usual to admit them. They have been considered sufficient, where the issue arose out of Chancery, and was between the same parties; but this is the case of a third person. As the answers are subscribed by the parties, it will be impossible to prove their hand-writing by the office copies.

*Lord* CHANCELLOR.

The copy of an affidavit would not be admitted; but that different. I never knew this done, except in cases of perjury.

in other cases I have always taken it, that the office copy is sufficient. It seems to be admitted, that it is sufficient between the same parties; and I cannot distinguish between the two cases; if it is so in one, it ought to be so in both. Certainly if the justice of the case required it, and the Court would not admit any evidence but the originals, it must be done; and it would be very hard, that you should be turned round at the trial on that account: but I wish, you would try the copy first; for I have no idea, that the Court will refuse it (99).

1790.

ANONYMOUS.

Mr. Lloyd.

[ 153 ]

By one of the stamp acts a particular stamp is required for these copies; and I am pretty sure, there is a case in *Burrow* (100) in which the question was only, whether it was upon the proper stamp; whence may be inferred, that, if it had been on the proper stamp, it would have been good evidence.

(99) Generally it is done only in criminal cases. *Fell v. Chamberlain*, cited from the *Register's Book*, A. 1772, 496, by Mr. Sugden, in his *Law of Vendors and Purchasers*, 97, note (I), 5th edit. *Keenan v. Boylan*, 1 Sch. & Lef. 232. *Stratford v. Greene*, 1 Ball & Beat. 294, unless proof of the signature is necessary: not where the action is by a stranger, unconnected with the suit in equity: post, *Jervis v. White*, Vol. VIII, 313. See *Fauquier v. Tynte*, VII, 292, and the references. Upon a question, whether the signature to a transfer in the books of the Bank of *England* is genuine, the book must be produced. *Auriol v. Smith*, XVIII, 198. See, as to the production of depositions of witnesses dead, or unable to attend, *Corbett v. Corbett*, 1 Ves. & Bea. 335, and the references in the note, page 342, and of proceedings in bankruptcy, post, *Ex parte Bernal*, XI, 557. *Ex parte Warren*, XIX, 162. 1 *Rose Bank. Cas.* 276. (100) *Denn v. Fulford*, 2 Burr. 1177.

1790.

DIXON v. OLMIOUS.

*June 2d.*

Petition to set down cause for farther directions, or such farther order, as Court should think fit, dismissed, though the parties could not proceed; an inquiry before the Master being rendered useless by the event of a verdict upon issue directed, and farther directions having been reserved till after trial and report.

**P**ETITION to set down this cause for farther directions or such farther order, as the *Lord Chancellor* should think proper, to enable the parties to proceed. It arose upon an inaccuracy in the decree, and the event of a verdict upon an issue directed. The decree directed the Master to inquire, what estates descended, and what were devised; also an issue to try, whether the republication of the will was prevented by fraud. The only reason for supposing, any of the estates descended, was that a recovery, which had been suffered, was supposed to have been a revocation of the will. Farther directions were reserved till after the trial, and after the report. The verdict established the will; by which the part of the reference to the Master, relative to the estates descended, became useless.

*Solicitor General* and Mr. *Mitford*, for the petition.

The Master cannot now make the inquiry. The result of the trial makes the difficulty; and after great consideration it was conceived, that this is the only mode of proceeding.

*Lord CHANCELLOR.*

I never knew such an application. Here has been a trial directed, and a reference to the Master. If the order was made so, that the cause cannot proceed under it, we must get rid of it either by varying the minutes, or some other way. Either the cause is ripe for hearing, or it is not. If it is, it may be set down of course; if not, it ought not to be set down, till it is: but I am not to tell you when to set down your cause. If I was to give you the order, it would not bind me, if the cause was not ripe for hearing; so that you would be only in the same situation, in which you were before, without coming here; and if I refuse it, you may set down the cause to-morrow. Dismiss the petition.

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Mr. *Lloyd*, on the other side, asked for 10*l.* costs.

*Lord CHANCELLOR.*

Costs given.

It is reasonable, they should pay costs; but 5*l.* is quite sufficient upon a petition, and no affidavits.



STEVENS v. SAVAGE.

1790.

June 2d, 14th.

———— *STEVENS* having been committed for a contempt, by having married Miss *Jeffry*, a ward of the Court, petitioned to be discharged.

There must be a reference to the Master for a proper settlement, before contempt for marrying a ward of Court can be cleared. In such case settlement of her personal property to husband for life, then to wife for life, then to children according to appointment of survivor,

Mr. *Mansfield*, for petition.

The petitioner made his addresses during the father's life; and was much encouraged by him and all the family. There are strong affidavits of the consent of the family.

Lord CHANCELLOR,

I remember the case. There were some circumstances, that might have been an alleviation. The wonder was, that he should take such a step: which was certainly very improper. But all, he can now have, is a reference to the Master to see, that a proper settlement shall be made. There is no other way. It is the common course of the Court to make such a reference, before the contempt can be cleared.

varied, so as to vest a moiety in the children at her death, if before his; but still subject to his appointment.

This petition came on again on the report of the Master approving a settlement, by which her personal \*property was given to the husband for life; then to the wife for life; then to the children according to the appointment of the survivor; to the sons at twenty-one: to the daughters at twenty-one or marriage.

June 14th.

[ \*155 ]

Mr. *Schwyn*, for the mother of Miss *Jeffry* said, her consent was not asked; if it had been asked, she would have given it.

Lord CHANCELLOR.

I consider it as an unfortunate case, arising from the petitioner's having taken that improper step. The only difficulty, I now have, is, that by this settlement nothing vests in the children



1790.  
 ~~~~~  
 STEVENS
 v.
 SAVAGE.

children of the marriage, in case the wife should die the husband ; but they must wait till his death ; which, I is too hard. Let a moiety of the personal estate vest children at the death of the wife, if she dies before the husband ; but still subject to the power of appointment settlement : for I only mean, that it should vest in them of that event ; that they need not wait till the death of the husband : and I expressly confine it to a moiety ; but I think it right, that a man should have a proper control over his family (1). Approve the report, except in that part in which the settlement may be varied (2).

The next day Mr. *Mansfield* for the petition informed Lord Chancellor that the sum of 9500*l.* which Mrs. had had from her aunt, and which made nearly half her personal property, was settled upon her for life to her sole and separate use, notwithstanding coverture ; and after her death to her children.

Lord CHANCELLOR.

As that amounts to the same thing, let the settlement be approved, as it was at first.

(1) In *Bathurst v. Murray*, *Murray*, VIII, 74. *Halsey*, IX, 471. *Peacock v. Crutchfield*, *Nicholson v. Crutchfield*, XVI, 48, 259. *Warter v. Warter*, XIX, 451. *Ball v. Coutt & Bea.* 292. 1 *Madd.* 375. *v. Broughton*, 3 *Ves. & B.*

(2) See, in this work, *Stackpole v. Beaumont*, *Like v. Beresford*, Vol. III, 91, 506. *Winch v. James*, IV, 386. *Chassaing v. Parsonage*, *Wells v. Price*, V, 15, 398. *Priestley v. Lamb*, *Salles v. Savignon*, VI, 421, 572. *Millet v. Rowse*, VII, 419. *Bathurst v.*

CATTON, *Ex parte*.

1790.

June 3d.

PETITION by Committee of a lunatic's estate to pass his accounts before the Master.

Committee of lunatic's estate not permitted to pass his accounts without inquiry, what money in his hands from time to time. Master to state particular circumstances.

Lord CHANCELLOR.

This thing has run into so much abuse lately, that I will never suffer a Committee to pass his accounts (3) without referring it to the Master to see, what sums of money, he has had in his hands from time to time. I must not allow a Committee to keep money in his hands without paying interest for it. Therefore let that inquiry be made.

Solicitor General, for the petition.

There is something particular in this. The allowance was so small, being only 80*l.* a year, that the petitioner has been about 100*l.* out of pocket.

Lord CHANCELLOR.

Let the Master state any particular circumstances, that are material.

In *Ex parte Clarke* and several other petitions by Committees of the estates of lunatics, or their representatives, similar orders were made on the same day.

(3) See the next case. Costs regularly. *Ex parte Clarke*, post, refused to a Committee, who 296. As to receivers, see *Fletcher* had not passed his accounts re- v. *Dodd*, ante, 85, and the note.

CHUMLEY, *Ex parte*.

1790.

June 3d.

PETITION by Committee of a lunatic's estate for passing his accounts before the Master. The Master had reported

Brother of lunatic, Committee of the estate, had managed it nine years before the commission; during which time there were considerable savings: to pay interest, though alleged, he made no use of it; unless particular circumstances to justify that.

above

1790.

CHUMLEY,
Ex parte.

above 2000*l.* savings from the personal estate of the lunatic ; who was seised in fee of real to the amount of 39*l.* a year ; and entitled to 4000*l.* upon mortgage, some *India* stock, furniture, &c. The Commission was not taken out till 1789 ; but he had been a lunatic nine years before ; during which time the petitioner, his brother, managed the estate ; and these savings accrued (4).

Lord CHANCELLOR.

He means to pay interest, I suppose.

Solicitor General, for petition

Said, he had made no use of it.

Lord CHANCELLOR.

But he ought to have made use of it. If he has been provident in not doing so, that will be something. Let the Master state any particular circumstances. This is not the common case. He cannot take upon him the management of the estate without paying interest. It is impossible to conceive, he should have had this sum in his hands without making use of it.

(4) See the preceding case. accounts regularly. *Ex parte* Costs refused to a Commit- *Clarke*, post, 296. See *Fletcher*, who had not passed his *v. Dodd*, ante, 85, and the not.

1790.

June 3d.

THOMPSON, *Ex parte.*

Creditor upon receiving his debt superseded a commission of bankruptcy without application to the Court : ordered to refund.

DALE being indebted to *Jackson* and *Wagstaff* drew a bill of exchange for 126*l.* 13*s.* payable to them three months after date. This bill was accepted ; but payment was refused upon which the payees, supposing the refusal to pay was an act of bankruptcy, struck a docket for the purpose of taking out a commission against the acceptor. They had also taken out a commission against the drawer. The acceptor afterwards took up the bill ; and the payees superseded the proceedings under both commissions without applying to the Court. The petition was by a creditor of the drawer, praying that the

payees might refund the sum of 126*l.* 13*s.* with costs, upon the ground that this transaction was an abuse of the process of the Court. The affidavits for the petition stated an agreement between the parties to supersede the commissions upon payment of this money: those on the other side denied that; and said, that not being able to see the acceptor, they thought, he was a bankrupt; that * the non-payment of a bill of exchange was an act of bankruptcy; and that one of the witnesses, who had sworn to the agreement, said at that meeting, that, as the acceptor had not committed an act of bankruptcy, if they proceeded to take out a commission, an action would lie.

1700.

THOMPSON,
Ex parte.

[•158]

Solicitor General against the petition contended, that either it was a mistake natural to a man, who knew nothing of law; or the debt was received under a threat, but not under an agreement to do any thing improper.

Lord CHANCELLOR.

This is a point of great consequence. A commission of bankruptcy is a remedy, which a creditor has a right to sue out; but which he must impart to all the other creditors. If they had only brought a common action, and had forbore it upon the money being paid, they might have done so; but if they strike a docket in order to take out a commission, they prevent any other person from doing so; and then they compromise it. Even if there was no petitioner against it, is it fit, that this Court should suffer a debt to be received after a docket struck? They admit, that it was done after the time, from which he was incapable of having any effects; and in that state of insolvency they hold him under a docket, and receive the money, and prevent other people from taking out any commission. The reason of striking a docket is to prevent the bankrupt from wasting his effects in the mean time. As to being afraid of an action, it is impossible, that they did not know enough of this circumstance to know, an action could have done nothing. I think, they must pay back this sum: but I will not give costs, because the affidavits were filed so late.

Attorney General applied to have this sum paid back to the estate of the acceptor.

1790.

Lord CHANCELLOR.

THOMPSON,
Ex parte.

Then you must pay the petitioner his costs.

It was so ordered (5).

(5) Post, *Ex parte Paxton*, Vol. XVI, 461. *Ex parte Brine, Buck*, 19, 108. See post, *Ex parte Gedge*, III, 349. *Wydown's Case*, XIV, 80. *Ex parte Browne*, XV, 472, deciding, that the security or satisfaction, taken after a docket struck, not followed by a commission, though it cannot be retained, and may amount to a contempt, is not a forfeiture of the original debt within statute 5 Geo. II. c. 30. s. 24. Such conduct disapproved; and the creditor not aided: *Ex parte Masterman*, post, XVIII, 298. The sub-

sequent statute 6 Geo. IV. c. 136. s. 8. declares such a transaction after a docket struck an act of bankruptcy; that if any commission shall have issued upon that docket, the *Lord Chancellor* may either declare such commission to be valid, and direct it to be proceeded in, or may order it to be superseded; and a new commission may issue; and may be supported by proof of that or any other act of bankruptcy; with the same forfeiture of the debt and the value received as in the statute of Geo. II.

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1790.

June 3d.

HOPKINSON, *Ex parte.*

Six months after bankruptcy creditor, who had bankrupt in execution on judgment, petitioned for account and to be admitted under the commission: account ordered, dividend to be reserved to the

PETITION for an account of what was actually due to the petitioner by the bankrupts, and that he may be admitted to prove his debt under the commission. The petitioner had the bankrupts in execution upon a judgment against them for 250*l*.

Mr. *Mansfield*, *contra*.

The petitioner ought to elect.

Lord CHANCELLOR.

It has been thought formerly sometimes, that a creditor may wait for a dividend, before he elects, and sometimes that he may not. A few days after he was ordered to elect in a fortnight. *Quære*, whether creditors may wait a reasonable time for a dividend, or must elect immediately. Creditor having taken his remedy at law, cannot take a dividend too; but may assent or dissent to certificate.

may not. I have never been able to understand, why the determinations have varied. It depends a good deal upon the time. It is hard though to keep them in prison. He has a right of course to assent or dissent to the certificate; but not to take his remedy at law, and a dividend too. We have lately been in the habit of saying, that he may wait.

1790.

HOPKINSON,
Ex parte.

Mr. Cooke being applied to by the Lord Chancellor said, there were cases both before Lord Hardwicke and Lord Bawurst, determining that he must elect immediately.

Lord CHANCELLOR.

I did not remember, that this was determined by Lord Bawurst. We have always lately thought, a reasonable time ought to be allowed, to see what the effects will be. But if that runs into any length, it would be hard upon the bankrupt. Supposing six months to be a proper time, this was in January; and we are now very near that time. It is said to be determined, that the petitioning creditor has made his election(6); and it is odd, if the petitioning creditor and the other creditors are in the same situation, that they should be in a different situation as to this. The petitioner prays an account of what is * actually due; and it seems a fair offer upon his part to go to an account. The proper order now is to take an account, of what is actually due to the petitioner from the bankrupts; and I must reserve a dividend to the extent of the verdict.

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On the 12th June the creditor was ordered to elect in a fortnight (7).

(6) *Ex parte Ward: Ex parte parte Sharpe*, XI, 203. *Ex parte Lewis*, 1 Atk. 153, 154. That is *Grosvenor*, XIV, 587; but by now the law. Post, Vol. III, 2. stat. 6 Geo. IV. c. 16. s. 59. the

(7) The general rule had been creditor cannot claim under the settled, that election could not be commission without relinquishing his action; and his proof or compelled before a dividend, except a special case: 1 Cooke's claim is an election. See the *Bank. Law*, 130, 8th ed. 153. *Ex notes*, III, 2. XIV, 588. *Ex parte Callow*, post, Vol. III, 1. *Ex*

1790.

June 3d.

POOLE, *Ex parte*.

Deeds not delivered up upon petition in bankruptcy.

PETITION by assignees of a bankrupt partnership for an order upon a mortgagee, whose title was affected by the bankruptcy, to deliver up the title-deeds, and all deeds relating to this estate.

Lord CHANCELLOR.

I cannot do it upon petition. The best way would be to bring an ejectment.

For petition.

That would not do; because petitioners want the title-deeds: besides, the legal interest is in the bankrupt.

Lord CHANCELLOR.

The title-deeds may make it necessary to bring a bill. — to the legal interest being in the bankrupt, since the bankruptcy it is in the assignees.

1790.

June 4th.

COLMAN *v.* CROKER.

Upon bill by son, Committee of his father, a lunatic, to set aside a voluntary

settle- [161]

ment by him, motion for Defendant to let the house, sell the furniture, &c. and bring the whole into Court, refused, Plaintiff not consenting.

GEORGE COLMAN, jun. Committee of his father. George Colman a lunatic, brought a bill to set aside a voluntary settlement made by the lunatic in trust for the Defendant Mrs. Croker, who lived with him.

Mr. *Mitford*, for Defendants, moved for an order to set aside the plate, linen, china, &c. to let the house, and to bring the whole property into Court, upon the ground of the danger of dilapidations, and that the house was unproductive; and that therefore it would be for the benefit of the Committee.

Solicitor General, contra.

The bill is to set aside this settlement, as being voluntary and obtained by fraud. The lunatic's property is not sufficient to pay his debts.

Lord CHANCELLOR.

If it is not consented to, I cannot do it. As to the fraud, there must be some creditor to complain of that; and he must put himself into a situation to complain by getting judgment for his debt, and stating, that by the settlement he is defrauded. But I cannot without consent of Plaintiff make any order, that may prejudice his title.

state, that he is defrauded by it, and get judgment for his debt.

1790.

COLMAN
v.

CROKER.

Creditor, to impeach a settlement for fraud, must

HUGHES v. HUGHES.

SOLICITOR GENERAL moved, that a receiver might be at liberty to distrain for rent.

Lord CHANCELLOR.

Is not the common order for the tenant to attorn to the receiver?

Solicitor General.

The person having the legal estate must distrain; it must be in his name.

Lord CHANCELLOR.

I thought not; but that the attornment gave the right to the receiver. It is necessary to compel the tenant to attorn. If you had the attornment, you must distrain in the name of the receiver, not of the other, because there is no privity. But it is very immaterial, whether it is granted, or refused. The *Register* says, it has been sometimes granted, and sometimes refused; and Lord *Northington* took it, as I did.

1790.


June 4th.

3 Bro. C.C. 87.

Whether receiver should get an order to distrain or for attornment,
Quære.

[* 162]

Mr. *Mitford* mentioned *Pitt v. Snowden*, 3 *Atk.* 750; where Lord *Hardwicke* says, receivers need not apply for an order to distrain; and he wondered, why they did so; because it gave the tenant an opportunity of conveying away his goods; as the Court never makes an immediate order of distress; but allows a future day upon such application: but if any doubt, who had the legal right to the rent, then an application would be

1790.

 HUGHES
 v.
 HUGHES.

be proper ; as the distress must be in the name of ~~the~~
 person (8).

Lord CHANCELLOR.

It is very immaterial, whether it is granted or no (9).

(8) In that case it does not appear, whether there had been an attornment. stated to be, that a receiver ~~m~~
 at his own discretion distrain ~~the~~
 one year's arrear ; but for ~~m~~

(9) In *Brandon v. Brandon*, 5 *Madd.* 473, the practice is an order is necessary.

WILLS, *Ex parte.*

1790.
June 12th.
 2 *Cox*, 233.
 Assignment of rents and profits, or of deeds is an equitable lien ; and assignee may in equity insist upon a mortgage.

Lord CHANCELLOR.

AN assignment of rents and profits is an odd way of conveying ; but it amounts to an equitable lien ; and would entitle the assignee to come into equity, and insist upon a mortgage. An assignment of deeds alone is sufficient for that purpose : and in this case there is a covenant for farther assurance.

STADGROOM, *Ex parte.*

[163]
 1790.
June 12th.
 1 *Cooke's B.L.*
 7th ed. 337.
 2 *Cox*, 234.
Quære ; whether shares of a ship, not at sea, were within 21 *Jac.* 1. c. 19. s. 11 ; or whether transfer of bill of sale were sufficient delivery of possession. Also whether it is affected by the Registry Act.

THE bankrupt had before the bankruptcy given the petitioner among other securities for a debt two bills of sale of two-sixteenths of a ship, not at sea (10), one of which he afterwards got back by a stratagem. The question was whether this was a sufficient possession ; or within statute 21 *Jac.* 1. c. 19. s. 11. (11).

(10) If at sea, it is out of the statute, if the muniments of the ship are delivered, *Bourne v. Dodson*, 1 *Atk.* 154. *Brown v. Heathcote*, 1 *Atk.* 160. 272. 622. 2 *Term Rep. K. B.* 462. 494. *Ibid.* 3. 267. 406. 1 *Bro. C. C.* 126.

(11) *Ryal v. Rowles*, 1 *Ves.* 348.

Mr. *Mansfield*, for the assignees.

He might have gone to the ship, and have given actual possession, though but of a part. If they had made actual assignments without delivery of possession, they would be void.

1790.
STADGROOM,
Ex parte.

Mr. *Lloyd*, for petition.

The bankrupt had only two-sixteenths of the ship. The statute has never been carried so far.

Solicitor General mentioned a *Nisi Prius* case at *Durham* where *Maling* had assigned two-sixteenths of a ship, which came into port time enough before his bankruptcy for possession to have been given; which was not done: and yet he believed, it was ruled to be good (12).

Lord CHANCELLOR.

Certainly according to the general rule possession is to be given: but in case of assignments of shares of a ship there seems to be no other way of giving it, than this. Nor does it appear, the bankrupt ever acted as owner of it from that time. At first sight, I should have held, that the transfer might be complete by a transfer of the instruments. It would be an objection, if it was a transfer of the whole. I will think of it.

For Assignees.

Another objection is, that it will be void upon the registry act.

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Lord CHANCELLOR.

I do not remember, whether that operates upon a share only: but it is worth looking into upon that also.

Solicitor General said, he believed, that case was taken notice of in the registry act (13).

(12) *Solicitor General* said he believed, the case was in the *Term Rep. K. B.* There is a case of *Atkinson v. Maling*, 2 *T. Rep.* 462: but it cannot be the same. prayer, that the share of the ship, of which the Petitioner held the bill of sale, should be sold before the Commissioners; and the produce should be applied in discharge of his debt;

(13) Mr. *Cooke* states, that this petition being again argued on the 2d of August the order was made, according to the deficiency, 1 *Cooke's B. L.* 7th ed. 338. 8th ed. 358. See the *Bankrupt Act*, 6 *Geo. IV.* c. 16. s. 72. and that he should prove the

1790.

June 10th.

3 Bro. C.C. 87.

Motion by a remote remainder-man and tenants to restrain receiver from ejecting tenants, refused with costs; their interest not being sufficient.

WYNNE v. LORD NEWBOROUGH.

UNDER the will of Sir *John Wynne* Lord *Newborough* was tenant for life, subject to a trust term; remainder to his first and other sons in tail, remainder to his brother *Glynne Wynne* in the same manner.

Motion on the part of *Glynne Wynne* and eighty tenants that *Price* the receiver should be restrained from proceeding to turn them out of possession; that they might remain in possession; and for an inquiry, whether that was not for the benefit of the estate. The trustees did not interfere.

Mr. Mansfield, for the motion.

The receiver had the usual powers of setting and letting with the approbation of the Master; but without that or communication to the trustees he has brought ejectments upon demise of a mortgagee, who has been paid his interest, and does not desire to be paid off: and has given notice to quit to the tenants, who have regularly paid their rent. The affidavit says, raising the rents will in the end be of considerable prejudice to the estate, though now by harassing the tenants it may be increased by it. There was an agreement, that he and the tenants should name each one person to settle the increase of rent. That he does not deny; nor that they have given him offence by voting *contrary to his inclination at the last election; and this is on the eve of another election. But it is sufficient for this motion, that he was proceeding to dispossess tenants, who regularly paid their rent, without approbation of the Master. The powers of a receiver are so far to be checked, that a Master must approve any alteration of the estate, unless upon some particular emergency.

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Mr. Richards expressed Lord *Newborough's* approbation of what had been done.

Solicitor General, for the receiver.

He did not apply to the Master, because he was told, it was not usual, where the purpose was merely to set and let for one year; so if he was wrong, it was a mere mistake.

Lord CHANCELLOR.

Nobody interested in the estate has made any complaint. Neither the tenant nor *Glynne Wynne* have any thing to say to it. Upon what ground of interest of their's would they apply? A receiver is to let the estate to the best advantage: perhaps it may have been underlet. The question is, whether it is better managed by keeping these tenants or not. But the rents are not to be raised on slight grounds; nor can he turn out the tenants without application to the Master; and I do not know how to make a distinction between leases for one year and others (14). It will come round to him in some way or other; but somebody interested in the estate for life or the term ought to apply.

The motion must be refused with costs.

(14) *Ante*, 139.

1790.

WYNNE
v.

Lord NEW-
BOROUGH.

Receiver is to let the estate to the best advantage; but he cannot raise the rents upon slight grounds; nor turn out tenants, nor let even for one year without application to the Master.

LODGE and FENDAL, BANKRUPTS. (Ex parte Assignees of.)

[166]
1790.

June 12th.

[IN 1765 *John Lodge sen.* *James Lodge*, and *John Lodge jun.* entered into partnership; which continued till the death of *John Lodge sen.* in 1774. He bequeathed all his personal estate after payment of debts and legacies to the surviving partners; and appointed them executors with his wife. The surviving partners continued to carry on the trade under the same firm, and the old articles till 1776; when the partnership was dissolved by consent, without coming to an account; but by agreement between them *James Lodge* was to be liable to the debts. Upon the same day a new partnership commenced between *James Lodge* and Doctor *Fendal*, who advanced 12,000*l.* to the partnership as his share; and *James Lodge* furnished an equivalent in articles of trade; and had the whole management of the trade; *Fendal* being a physician, and utterly unacquainted with it. In *March* 1778 the partnership became bankrupt. Before that event *James Lodge* had without the knowledge of the other partner paid several of the

Creditors of a partnership, which failed in two years, allowed to come upon the separate estate of one partner in respect of effects taken out of the partnership by him without the privity of the other.

1790.

LODGE and
FENDAL,
Bankrupts.
(*Ex parte*
Assignees of.)

debts of the former partnerships, and private debts of his own, with the property of the last partnership to the amount of above 36,000*l*. An order was obtained by the separate creditors of *Lodge* to prove under the joint commission. Under application of several creditors of the last partnership to prove against the separate estate of *Lodge* for the sum taken out of the partnership the Commissioners admitted them: but upon the petition of his separate creditors that the proof might be expunged, the *Lord Chancellor* thought, that considering the nature of the case, it was not proper for the Commissioners to determine it; but that there ought to have been a petition for an order: upon which a petition was presented by the assignees of the last partnership, that the joint creditors might be admitted to prove against the separate estate of *Lodge* in respect of the effects taken by him out of the partnership.

Solicitor General, for the petition.

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A bill filed by some of the creditors of the old partnership to have great part of the effects of the last considered as the effects of *the old partnership, was dismissed. In this case the partnership was very short, only two years. *Lodge* had the whole management; and applied the partnership effects to purposes totally unconnected with it without the privity of the other; which being a fraud, the Court will allow the partnership to be creditors; as in the case of *Fordyce* before Lord *Bathurst*; which was so determined, because there was no authority by the other partner.

Mr. *Hollist*, *contra*.

It was the duty of *Fendal* to see to the disposition of the property; and that the business was carried on properly. It does not appear, that the separate estate of *Lodge* was benefitted by this. *Ex parte Parker*, 7th of August, 1780 your Lordship dismissed a petition by assignees under a separate commission to be let in as creditors under a joint commission for a sum brought into the partnership by one partner beyond his share. *Ex parte Burrel*, 22d July, 1783, 1 *Cooke B.L.* 556, and the other cases there cited were to the same point. So *Ex parte Vere*, before your Lordship.

Mr. *Mansfield*.

In those cases it was held, that by the consent of the party the separate property became part of the joint stock.

1790.

LODGE and
FRNDAL,
Bankrupts.
(*Ex parte*

Lord CHANCELLOR.

Against the petition it is argued from the reverse of the case, which does not seem to apply. In those cases of separate debts offered to be proved against the joint estate the principle of the rule I take to be this: that where one partner has brought into the joint estate a sum, the creditors rely upon the ostensible state of the fund; and give credit accordingly. But here in fraud of the contract one partner has taken out a certain sum. The petitioners state simply this, that money has been taken out of the partnership stock by one partner without the privity of the other; and the question is, whether they shall go upon the separate fund on behalf of the joint creditors, or whether by means of that fraud it shall belong to his separate creditors, any more than it would have belonged to him. It has certainly gone to increase his separate estate. Those cases are not applicable in specie to this particular case. You have produced no case upon an application of this kind.

Assignees of.)
Assignees under separate commission cannot come upon joint estate for a sum brought into the partnership beyond his share; for creditors rely on the ostensible state of the fund.

For petition.

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There is a case *Ex parte Drake*, cited in *Ex parte Lanoy Hunter*, 1 *Atk.* 225, 1 *Cooke's B. L.* 556, where a partner had taken out of the partnership stock more money, than his share amounted to; and Lord *Talbot* admitted the partnership creditors to come upon the separate estate for so much. But your Lordship has in some later cases expressed some doubt about the principle of that order. The case *Ex parte Vere* was decided as a case of privity: there was a constant communication of the houses at *London* and *Manchester*.

Lord CHANCELLOR.

This comes within the compass of two years. This was certainly taken out of the partnership stock; and it is very difficult to distinguish this case from that of *Fordyce* (15).

I think,

(15) *Ex parte Cust*, 1 *Cooke's Bank. Law*, 535, 506, ed. 7. 531, ed. 8

1790.

LODGE and
FENDAL,
Bankrupts.
(*Ex parte*
Assignees of.)

I think, the petitioners should be admitted to prove; *tu*
so de bene esse (16).

(16) Lord *Thurlow* appears from contract, a solvent pa
finally to have dismissed the pe- having paid the joint debt
tition; considering this as not post, *Ex parte Turner*, Vol
amounting to a case of fraud: 243; *Ex parte Rushforth*, X
Ex parte Batson, 1 *Cooke's B. L.* *Paley v. Field*, XII, 435)
534, 530, ed. 8; *Ex parte Harris*, mitted to prove under a se
2 *Ves. & Bea.* 210. In such a commission. *Ex parte* J
case of fraud, as distinguished 3 *Ves. & Bea.* 31.

1790.

June 12th.

GORING, *Ex parte*.

Assignees of
bankrupt made
no dividend,
but thirteen
years after the
bankruptcy
had from the
produce of the
property ac-
cumulated
enough to pay
fifteen shil-
lings in the
pound: sale
and distribu-
tion ordered
on petition of
one creditor.

SIR *George Colebrooke* became a bankrupt in 1777. A
time of his bankruptcy he was seised in fee of an
subject to a jointure to Lady *Colebrooke*; and to 4000*l.* to
if she should survive him, and a charge for younger chil
He was tenant for life of estates in *Scotland* of 2000*l.* a
which were out upon lease, and had continued so ever
and was possessed of 100*l.* a year in *London* of a share in
New River water works; and had other property, sufficie
sold, to pay about twenty shillings in the pound. The assi
had made no dividend; but had lent two sums of 24,000
2000*l.* upon mortgage; and from the interest and the rent
profits had accumulated a fund sufficient to pay about 1
shillings in the pound. *Goring* representative of *Nash*
ditor for 2000*l.* petitioned, that the assignees should ac
for what they had received; that the two sums lent upon
gage might be called in; that the estates of the bankrupt
be sold; and the produce distributed.

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Solicitor General and Mr. *Mitford*, for the petition

These two sums ought to have been distributed, inste
being lent out. It is admitted, that the 24,000*l.* was l
James Barwell an assignee; the other to — *Barwell*
an assignee, or the brother of one. Suppose this me
expedient, can your Lordship say thirteen years after the
ruptcy, that this is a distribution? The petitioner is th
consid

considerable creditor besides the *Barwells*, who oppose this petition. *Ex parte Matthews*, before your Lordship.

1790.

GORING,
Ex parte.

Mr. *Mansfield*, *contra*.

It was considered to be for the advantage of the estates, that they should not be sold, at least not yet; and this has been the sense of all the creditors; for till the death of *Nash* there was no application; and the only person now complaining is his representative. The mortgage was on purpose that the money might carry interest.

Lord CHANCELLOR.

Thirteen years have elapsed since the bankruptcy. If it turns out, that the assignees have kept money in their hands unwarrantably, my opinion is, that you need not go into the point, as to the manner, in which they have employed it; for an assignee must not keep money in his hands (17). As to proceeding under the commission to sell the estate, they must have an order from the Court: I do not recollect any statute, which gives authority to the Commissioners to decide, whether an estate should be sold, or not. Any creditor has a right to have the estates of the bankrupt sold, and the produce divided; nor will the prudence of the plan pursued, or the consequences, enable the Court to prevent the sale. If the law would give me that discretionary authority, perhaps it would be wise; but till it does, I cannot exercise it. This is a hard case, if the petition is brought obstinately, now that they have got so near the whole sum, to have the estates sold, instead of being restored to the bankrupt: but though I suspect, it would be advantageous for things to go on, as they do at present, if they account from time to time (and there may be a case so stated, that it may appear to the Court to be advantageous) yet if the order for sale is pressed for, I cannot refuse it; and the petition of any one * creditor is sufficient. I remember in the case of a *West India* estate I did not think myself at liberty to speculate upon affidavits. There is no reason, why this mortgage money should not be paid in. The creditors will be entitled to interest,

Assignee of bankrupt must not keep money in his hands. Commissioners not to decide, whether an estate of bankrupt shall be sold, or not: there must be an order for sale: any creditor has a right to insist on it.

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(17) Stat. 6 Geo. IV. c. 16, charged with interest at 20 per cent. *Hilliard's Case*, ante, 89.

1790.

GORING,
Ex parte.

Creditors of
bankrupt en-
titled to inte-
rest if a sur-
plus.

rest, if the estate produces more than will satisfy the debt. They must satisfy this creditor: the order must be for go before the Commissioners for an account to be taken of the estates to be sold (19).

(18) *Ex parte Morris*, ante, 132; post, *Ex parte Mills*, 295. *Ex parte Clarke*, IV, 677. *Ex parte Reeve*, IX, 588.

(19) They were afterwards advertised for sale,

1790.

June 14th.

Trust fund,
which under a
power in mar-
riage settle-
ment had been
lent, decreed
to be paid into
Court, the
trustees repre-
senting it to
be in danger.

PAYNE v. COLLIER.

BY the marriage settlement of *John Dyer Collier* a trust was created with a power to the trustees to put on interest upon good and sufficient security part of the fund amount of 3000*l.* according to the recital; but in the recital part there was no limitation as to quantity. In pursuance of this power the trustees lent the husband 5000*l.* being the whole of the fund, upon his and his father's bond, having been repaid, the trustees brought a bill to have the same remained due paid into the Bank in name of the *Attorney General* for the purposes of the settlement, and decree made out of the estate. They stated, that they conceived the husband to be in danger.

Solicitor General, for Defendants.

This demand cannot be resisted; but from the peculiar circumstances the Defendants ought to have some indulgence as to time. When this money was lent, it was principally secured by the security of the father, who was in very good circumstances. He has since become involved by being security for another 3000*l.* of this fund has been paid, partly before, and partly since the bill filed; and they say, they are engaged in an extensive trade; and in seven or eight months will be able to pay the whole; whereas pressing them for it now may prevent them from proceeding in their trade.

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Lord Chancellor.

I am afraid, I must order it to be paid in immediately. The trustees represent it to be in danger. Though I

inclined to allow them time, I cannot. But in the recital the power is to lend 3000*l.* of the fund, though in the contracting part it is not limited: upon that the parties would be entitled to come into this Court to have the settlement reformed according to their intention declared in the recital (20) and for a declaration, that the trustees were not competent to lend more than 3000*l.* As that is the case, perhaps it would be the wisest way in the trustees to allow them time, by which they may secure themselves from the consequences of having exceeded their authority. Let him pay it in at the Bank in the name of the *Accountant General* in trust in the cause: but I cannot give costs out of the estate of the infant. The Defendants must pay costs.

1790.

PAYNE
v.

COLLIER.

Settlement reformed according to the intention declared in recital.

On the 11th November, 1790, a motion was granted, that the *Accountant General* should be at liberty to receive and lay out a part of this fund remaining due, which Defendants were ready to pay; and to apply the interest and dividends according to the decree and settlement. The *Accountant General* conceived, that he could not do this without an order; as the decree had directed the whole sum to be paid.

(20) Settlement not reformed according to the intention, where nothing *dehors* the words to do it by; the recital being merely general, and with reference only to what followed. *Doran v. Ross*, ante, 57.

Will, made upon a mistake of testatrix, not altered to comply with the intention, where no words to shew, what the will would have been, if that mistake had not happened. *Smith v. Maitland*, post, 362.

BUTRICKE v. BROADHURST.

1790.

June 14th.

3 Bro.C.C. 88.

PLAINTIFF's husband by his will, of which she was sole executrix, gave all his estates both real and personal to trustees upon trust to permit her to receive the rents and profits

Husband devised all his real and personal estates in trust for his

wife for life, provided she should not marry; and made her executrix, The trustees not acting, she took possession. After receiving rents and profits for five years not allowed to elect to take a sum under marriage settlement, without special ground, as that from the situation of the property it was doubtful, what would be the result.

1790.
 BUTRICK
 v.
 BROADHURST.

for life, provided she did not marry again. She proved the will. The trustees never acted; and she received the rents and profits for five years after his death; and then filed a bill, claiming to elect to take an interest in a trust fund of 2000*l.* under her marriage settlement instead of the estate under the will.

Solicitor General, for Plaintiff.

She might, if called upon, have made her election. She received the rents and profits, because there was nobody else to take any care of them. If the bill had been filed against her, the trustees taking no care of the interests of *cestuy que trust*, it would have been competent for her to say, she only meant to perform the office of executrix, and received the rents and profits, because nobody else would; and that she was ready to account according to the will; that is, claiming the rents and profits herself for life; or upon the other hand, that nothing was done, but acts of necessity; and that she might elect. I cannot find a case, except that upon the will of the Duke of *Montague*, *Lord Beaulieu v. Lord Cardigan*, *Amb.* 533, and in *Browne's Parliamentary Cases*: and in that case the acts were very various, and more in number than in this. Supposing there was no real estate, no more evidence arises from her possessing herself of the interest of the personal property, than of the principal; as, being executrix, she must have received the interest in order to account for it; and she could not without a decree have given any to the devisees over; for by the will they could have nothing until her decease or marriage,

Lord CHANCELLOR.

Party having
 right of elec-
 tion may file
 a bill to have
 property clear-
 ed in order to
 elect to ad-
 vantage.

I thought *Lord Northington* tolerably well founded in that case; but it was determined otherwise in the House of Lords; who decided, that the right of election lasted fifty years. But all, that was determined by it, was, that under circumstances it may last, till the whole affair is wound up, and the trusts executed. I agree now, that if the Plaintiff had filed a bill, stating that she did not know the state of the fund; and desiring to have the debt and legacies paid, and the property cleared, that she might elect to advantage, she might have done so. So if the other parties had filed a bill, it could only have been to
 forc

force her to make her election. But here having taken possession under the will, and the estate being a free fund from the beginning, I cannot think of a principle, upon which the Court can say, she is now competent to elect. The bill must be dismissed; but I wish it to be understood, that it turns upon the particular circumstance, that the bill was filed without any ground; and no suggestion, that the real or personal estate is in such a situation as to render it doubtful, what the result would be. She consequently has laid no ground, that entitles her to elect after enjoyment for five years (21).

(21) Widow, having received a legacy and an annuity under will of her husband for three years, was allowed to elect to take her dower. *Wake v. Wake*, post, 385.

CLINTON v. HOOPER.

MRS. CLINTON having by settlement a joint interest with her husband in freehold and copyhold estates originally her own, having descended to her as heir at law to her brother, joined in a mortgage of copyhold by surrender to *Deans* in fee for 1500*l.* for which sum the husband also gave his bond, and in a sale of either of those estates to the amount of 4000*l.* The husband received the money, and laid it out in the purchase of real estates, except 1000*l.*; which he applied in buying up a dower right, to which his wife's estates were liable. By his will he gave his wife an annuity of 60*l.* a year out of the purchased estate, and some other bequests, to the amount in all of 80*l.* a year according to her; of 116*l.* a year according to the executor. He gave *Hooper* a freehold estate for life; and, after giving some legacies, made him executor and residuary legatee; and charged his real in aid of his personal with all his debts except those due upon mortgage. There was but one mortgage debt besides that to *Deans*. After the death of testator his widow paid interest upon the mortgage to *Deans* for two or three years; and then brought a bill against the executor and mortgagee to have that mortgage satisfied out of the assets of her husband.

applied for the husband's use; not to prove the transaction itself different from what it appears to be by the instruments and the other evidence; as that it was intended as a gift to him.

1790.

BUTRICK
v.

BROADHURST.

[*173]

1790.

June 15th.

1791.

Jan. 25th, 27th.

3 Bro. C. C. 201.

Wife barred from her right to be exonerated out of the assets of her husband in respect of money raised by mortgage of her estate, and received by him, by telling executor, she would not raise her claim; and no difference, whether legacies were paid before or after. Parol evidence of her declarations admissible to prove, that it was not

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 ~~~~~  
 CLINTON  
 v.  
 HOOPER.

Defendant *Hooper* set up two grounds of opposition: an agreement between the husband and wife, that her should continue liable: secondly: supposing that agree void, because during coverture, that it was confirmed when a widow. In support of this he read parol evidence the following effect.

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“ It was the intention of the parties to sell the whole  
 “ this part was mortgaged only, because a purchaser could  
 “ be procured for it. In a conversation with *Wheeler*  
 “ *Hooper*, upon settling an account with her of arrears of  
 “ annuity under the will, she intimated something about  
 “ right; they told her, testator’s estate was not sufficient  
 “ all: she answered, that *Harris* had advised her of this  
 “ but that she did not mean to claim it; but desired, that  
 “ cousin *Hooper* would proceed in paying the legacies.  
 “ they went away, *Wheeler* apprehended from her conversation  
 “ and manner, that every thing was settled; and that she  
 “ meant to discharge the mortgage herself without making  
 “ that claim. About three months after *Wheeler* and *E*  
 “ being informed, that she refused to pay any more in  
 “ went to know her determination; and *Hooper* asking  
 “ how she could think of making this claim, when she  
 “ it was agreed between her husband and her, that the  
 “ to be paid out of the estate; she replied, it was true,  
 “ her agreement with her late husband, that the estate should  
 “ be sold for his benefit; but that *Harris* had told her  
 “ might have this satisfaction: that she expected, that  
 “ husband would have left her the estates purchased for  
 “ but however she thought herself much better off, with  
 “ she had under the will. *Hooper*, at the request of Plaintiff  
 “ borrowed money to discharge the legacies.” By the  
 “ dule to *Hooper*’s answer all, except two small legacies  
 “ appeared to have been paid previously to these conversations.  
 “ The executor denied assets sufficient for all the purposes of  
 “ the will, if this charge should be allowed.

*Solicitor General, Mr. Lloyd, and Mr. Richard*  
 Defendant.


The rule of this Court is, that if the husband and wife  
 borrow money upon mortgage of the wife’s estate, and no

is said about it, and the husband takes the money, the estate remains liable to the mortgagee; but the wife has a remedy against the assets of the husband. The agreement need not be in writing. There have been parallel cases in this Court between other persons, as between father and son. If a father prevails upon a son to mortgage his estate, the son will have a right to call on the father to reimburse him: but if there is any parol agreement to shew, it was meant, the son's estate should still continue debtor, that would rebut the equity. The only ground \* then for Plaintiff is her incompetency to make an agreement to bind her, because she was married and without any separate property; for if separate, this agreement would have bound her. Though married, it was at least a sufficient declaration of the intention of the parties to rebut the equity; but if not, her subsequent acts were a ratification; and a void act, such as an agreement by a married woman, may be afterwards affirmed (22). It was determined in *Goodright v. Straphan, Cowp.* 201, that where husband and wife mortgaged her estate, and she paid interest a considerable time after his death, that was sufficient to induce the Court to presume a re-execution. Plaintiff now comes as a creditor to charge the executor with having committed a *devastavit* against her by following her directions in paying the legacies. There are no cases upon this question, where there has been any agreement; but those, upon which Plaintiff must stand, are dry cases, in which there was no agreement; but the husband took the money; and that raised a presumption, that he ought to pay it. There are cases shewing, that it is the course of the Court to inquire about the intention. There can be no doubt about it in the case of a third person; and Lord *Hardwicke* has said, that it depends upon this; whether the party is to be considered as a creditor, or as giving a bounty: *Lewis v. Nangle, Amb.* 150. The state of that case is more full in the note upon *Evelyn v. Evelyn, 2 P. Will.* 4th ed. 665. That case proves, that the Court will attend to the real agreement, though not expressed in the mortgage deed: there by the deed

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CLINTON  
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HOOPER.

[ \*175 ]

(22) Wife bound by subsequent acts to perform an agreement, recited in a bond by the husband, to settle her estate; though she was not an executing party; and nothing moved from him. *Archer v. Pope, 2 Vex.* 523.

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 v.  
 HOOPER.

[ \*176. ]

deed it was only to pay part to the husband's use, and part to discharge the wife's debts; and Lord *Hardwicke* said, the Court would not set up two presumptions, but would adhere to one only; and that as the greater part was manifestly not intended to be accounted for by the husband, he should take it, the rest was not: and that as the mortgage was a single transaction, he should suppose the intention uniform; and the bill was dismissed. In *Parteriche v. Poulet*, 2 *Atk.* 384, Lord *Hardwicke* thought, the question was upon the intention of the original agreement; whether it was to be considered as a bounty or a loan only from the wife; and it is not material, that the whole agreement should have been mentioned in the deed; for any evidence, that it was meant to be given to the husband, \* will raise a presumption against the wife. Upon the second point; supposing her incompetent to bind herself, because married, and without separate property; yet after the death of her husband, when competent, she might have ratified it, as she pleased. Suppose she had said "pay the interest to *Deans*, it being agreed between me and my late husband, that I should be liable for the money:" there is no case, that such a ratification by her, when a widow, would not bind her: nor is it necessary to be in writing, because only to rebut the equity. The reason of mortgaging this estate instead of selling it, and the original intention to sell the whole, shew, the intent was to put the money in the pocket of the husband. In case of freehold, I admit, there must have been a fine; here there was a surrender; and it was not the estate of the wife; for the surrender was to the husband and wife, and the heirs of the survivor; as between them it was an entirety, and his estate. The evidence is at least clear: to shew, that the husband thought, the money was his own; and if so, there is a good defence upon another ground, that she acted under the will, receiving an annuity out of the very estate purchased with this money; which he could not intend considering her also as a creditor; for he supposed this his own property. His exception of mortgage debts in his charge upon his personal and real shews, he did not consider this as a charge upon them. If he had said "*excepting the debt I owe upon mortgage*," and there had been no other mortgage debt but this, the wife could not have made this demand, and  
 at.



at the same time have taken this interest under the will; and in fact there was but one other debt upon mortgage. This therefore is in direct contradiction to the intention.

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CLINTON  
v.  
HOOPER.

Mr. Mansfield, Mr. Mitford, and Mr. Stanley, for Plaintiff.

The question is, whether there is any thing altering the common rule of this Court, that a wife, who has subjected her estate for her husband, shall have a right to be reimbursed out of his assets. That general rule is not disputed: but it is said, that in this case it is to be taken as an absolute gift. There is no trace of that in the instrument.

Lord CHANCELLOR.

Defendant goes upon her declaring, that her intention was to make her estate subject to the money, and not bind the husband. \* The first question is upon the same principle, that obtains between principal and surety. A contract is inferred upon the part of the husband, which may be rebutted. I think, there is a case called *Ashley's Case* (23), where this was discussed.


[ \*177 ]

For Plaintiff.

*Tate v. Austin*, 1 P. Will. 264, establishes the general doctrine; and that every thing is to be taken favourably for the wife: and there the Lord Chancellor reminded the Counsel of *Lord Huntingdon's Case*, 2 Vern. 437. In *Lewis v. Nangle*, Lord Hardwicke supposes the general rule to be, that where the husband borrows money for his use, and the wife consents to make her estate security, her estate shall be creditor for it upon his assets. There is no case, where any thing, short of what appears upon the deed, shall prevent it. If from the nature of the transaction, as if there was a settlement upon her at the same time, as Lord Hardwicke in that case supposes, there is reason to think, she meant to give it to him, it would be considered as one entire transaction, and would prevent the general rule from being enforced: otherwise, he says, it would be very inconvenient to men going to marry; and

(23) *Harvey v. Ashley*, 3 Atk. 607.



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[ \* 178 ]

and nine times in ten contrary to the intention: but such evidence as this was never thought sufficient. As to the case in *Cowper*, there is such a decision; but the principle of it has always been much doubted; and it is directly contrary to *Drybutter v. Bartholemew*, 2 P. Will. 127; where husband and wife made a mortgage by lease, and her paying interest was not allowed as a confirmation. That case was not considered in the case in *Cowper*; which was decided upon a case in *Perkins*, that was misapplied: for there the sense seemed to suppose, that it was re-delivered, though it was not expressed; and the Court thought, she might by acts confirm it. *Parteriche v. Poulet* is not applicable, except to support the general rule. There a woman had a portion of 5300*l.*; and at the same time gave a bond to the husband's father for 700*l.* signed by her, but at the bottom in the husband's hand were these words. "*I own this to be my debt.*" Lord *Hardwicke* said, parol evidence was to be laid out of the case; as he was obliged to confine himself to the deed; and that to add any thing to an agreement in writing by admitting parol evidence is not only contrary to the *statute of frauds*, but to the rule of the common law before that statute. The present case is favourable for the wife. The husband desired \*to purchase an estate, for which he had no fund: she enabled him to do so by this sale and mortgage; and he assured her, he would settle the new estate, as the estates sold and mortgaged were settled; namely to him and her and the survivor. When he made his will, he forgot that intention. The conveyance being in fee to the mortgagee, he never had the legal seisin so as to give her a right to dower. The circumstance of her paying interest signifies very little; for if she had not done that, she would have been turned out of possession. In the first conversation she is not represented to have said a word of any agreement with her husband; nor did *Wheeler* dispute her right: and there is nothing in the second like an agreement to waive that benefit, she found, she had. It was not fair in *Wheeler*, a man of business, to go and talk with this woman about business without somebody present to advise her. There is nothing in the will taking away her right. To say, he understood this as a mortgage of his, and that by not providing for his mortgage debts he intended, his estate should not

be charged with it, and that if she has any right, she is taking advantage of it to contradict this part of the will, is going too far; where he only says, he gives, &c. to pay all his bond, and simple contract, but not his mortgage debts.

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Lord CHANCELLOR.

I do not think, there is any thing material to that in the will. If there was, at most it would go to put her to her election; but there is nothing to raise it to that height: it is too general. There is no doubt of the general rule (24). The question is as to the principle, and what will be the extent of it. In fact it is no more, than an inference arising from the transaction, by which a contract is inferred, that the husband was to buy that estate, and she made her estate liable to enable him to do so. If that was all, the consequence will be, that parol evidence may be admitted, that the wife agreed, that her estate should remain liable; for her estate was *prima facie* charged, and sufficiently made liable to it. When it was first opened, I thought, her right stood upon a more solid foundation; and I then doubted, and still doubt, how far parol evidence can be admitted at all: but those cases cited for Defendant shew, that Lord *Hardwicke* thought, this was the same sort of case, as between \* principal and surety. Any evidence of conversation between principal and surety at the time of raising the money is evidence to rebut: and if this is in that situation, here are strong conversations; and, if the witnesses are to be believed, it is impossible not to give way to it. The point, I am now upon, is the admission of the evidence; for if the contract arises upon facts, and is consequently liable to be rebutted by evidence, the evidence here is most express. When I first heard it, I thought, I should not have admitted parol evidence. I thought at first, the wife had a right to stand in the place of the creditor; but if the rule is the other way, it will come to be material to consider, what the case would be, if the husband had paid it off: for if circumstantial evidence will do, parol evidence will *a multo magis*.

General exception of mortgage debts out of charge in will for debts not sufficient to put wife to election to take under will, or have mortgage of her estate paid out of assets.

[ \*179 ]

Any evidence of conversation between principal and surety at time of raising the money is evidence to rebut.

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For Plaintiff.

In the case of *Lord Huntingdon*, 2 Vern. 437, the husband did pay it off, and the wife was determined to have a right to be disencumbered.

*Lord* CHANCELLOR.

The question upon the will struck me to be out of the case because so general. I conceived the estate in the way, in which it has descended, in precisely the same situation, as it settled that way; the question being upon her interest; which was a contingent interest in the fee-simple; and it was mortgaged; and upon the general rule she is entitled, after the rest of the debts paid. Suppose he had said expressly, that this mortgage was to be paid out of that estate; that would have been a case of election. He must have been understood to say, "I know, my wife's estate ought to be exonerated, but I have given her a compensation." I am inclined to believe, she gave up this in consideration of the other being settled upon her. It looks, as if he had disappointed her in not making the settlement.

For Defendant.

Supposing that to be the case, her equity would be to have the estate purchased settled; that could not be, because it was devised.

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*Lord* CHANCELLOR.

The question is simply this, whether the agreement of the wife confirmed, as made at the mortgage, does or does not determine her right to come upon the husband's assets. But it is a very important thing to lay down a general rule to govern every case. Let it be spoken to again; and look into the cases upon it: there are many. I think, there is somewhere one called *Ashley's Case*; where this was more fully discussed than in any other (25).

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(25) *Harvey v. Ashley*, March marriage, and when she was a 1748, 3 Atk. 607, cited 2 Ves. 671; infant, by having received for in which a wife was held to have year or a year and a half after ratified a settlement made before coming of age a jointure under i

This cause came on again, having been abated by the death of Defendants *Hooper* and *Deans*, and revived against their representatives.

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v.  
HOOPER.

For Defendants.

1791.

Jan. 23d.

As to admitting the evidence, suppose the time had been fifty years, a whole life of such declarations; could they not have been proved? Suppose *A.* advances a sum of money to *B.* that is *prima facie* a debt of a higher nature than the debt of Plaintiff: suppose *A.* brings an action against *B.* is it not competent to *B.* to shew by evidence, that it was meant as a gift? Suppose no money advanced at the time; but that *A.* and *B.* became indebted by a bond joint and several to *C.*: here are two debts; one upon the instrument; the other a possible debt by inference from the circumstances, depending upon the question who received the money. If *B.* brings an action against *A.*, cannot he shew, it was intended as a gift? The same principle applies here, and more strongly. Here the evidence is not offered with a direct intent to charge the husband of the wife; but she, having by the equity of this Court a right to charge the estate of her husband, says, she waives it. Why not? She is only a creditor in this Court; and if the Court gives her a separate character, that she may acquire this right, it also gives it to her subject to the inferences, which would attend the separate character of any person, who had the right without the assistance \* of this Court. Put this case, that the money had been paid to her, and that she had given it afterwards to her husband; might not that be shewn to bar her claim?

[ \* 181 ]

Lord CHANCELLOR.

I apprehend, it has been determined, that, if the fact is proved of the application of the money to the use of the wife, that would bar her demand. The question then is, whether exclusively of that fact, which, when known, destroys her equity, she can give up that equity, while covert. She does not stand in the place of the mortgagee; but would have a right to be repaid out of the general assets of the testator.

Proof of application of money raised on wife's estate to her use bars her demand on husband's assets.

Wife does not stand in place

of the mortgagee.

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HOOPER,

For Defendant.

This evidence does not contradict any instrument, nor affect any property in land. She acknowledges, she is bound at law; but says, the presumption in this Court is, that she is to be surety only, the husband the principal, he having had the use of the money. It is necessary to apply to parol evidence to shew, who is principal, and who surety; and it being found, that he had the use of the money, the presumption may be repelled by any evidence shewing, she meant to be the principal debtor. In a case of principal and surety any agreement may be shewn to rebut. The first inquiry is as to the application of the money: if he alone received it, and there is no evidence of her intention to give it to him, she is considered as surety, he as principal: but there are cases, where the money has been applied for both; and then the rule does not apply. *Lewis v. Nangle*, *Earl of Kinnoul v. Money*, from a note of Mr. *Salisbury Jones*; but not in print (26). It was a re-hearing before Lord *Camden*, 18th March, 1767, when it was argued by Mr. *Yorke* and others to be all matter of presumption, and depending upon the intention of the wife; and *Lewis v. Nangle*, *Pocock v. Lee*, 2 *Vern.* 604, *Tate v. Austin*, *Lord Huntingdon's Case*, and *Bagot v. Oughton*, 1 *P. Will.* 347, were cited. Lord *Camden* said, the application of the money was to determine, who was principal, and who surety; and directed the Master to inquire into the application; and said, *Lewis v. Nangle* depended on circumstances too particular to be a precedent for any case not exactly like it. He said also, if the wife had expressed her intention in \* the will, which by the settlement she had a power to make, it would have done. If by will, why not by parol evidence? For it is only to repel a presumption, arising from the application of the money for the benefit for the husband; which may be repelled; and it was said in that case, that it was to be considered as if between indifferent persons. The decision there was, because there was nothing in the will to shew the intention: if any thing, that would have done (27).

[ \*182 ]

(26) See the case stated by the Lord Chancellor, post, and as since published by Mr. *Swanston*, 3 *Swanst.* 202, n.

(27) i. e. to charge the wife's estate.

*Lord* CHANCELLOR.

Because she had a right under the settlement to make a will, and to make the estate liable to that mortgage. There is nothing in the case applicable to this point, except that part as to principal and surety: there is something of that in it. *Lord Hardwicke's* determination, which was affirmed, went upon the ordinary parts of the other cases. But as to the principal part of that money, there could be no doubt about it; it would have been the same, if the case of ancestor and heir.

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v.  
HOOPER.

For Plaintiff.

In the cases cited *Lord Camden* makes the question solely depend upon the application of the money to relieve another estate of the wife. There is nothing to shew, that any declarations by her are to be received in opposition to the general effect of the instruments. About the application here is no doubt. The application must be made out by evidence; but that does not prove, that evidence of these declarations must be admitted.

*Lord* CHANCELLOR.

Suppose evidence offered to shew executor intended to be a residuary legatee, notwithstanding a legacy, given to him: that would not, I think, be admissible, as in *Brown v. Selwyn* before *Lord Talbot*, where the attorney made the will.

For Defendant.

The question there was as to the extinguishment of a debt, and the evidence was refused upon another ground.

*Lord* CHANCELLOR.

I apprehend, it was, because he could not go out of the will (28).

[ 183 ]

For Defendant.

No; but the evidence in the case put by your Lordship is clearly admissible. The executor having the legal right is sought to be ousted of it by the equity of this Court: the law always

(28) That was the reason. *For.* 242.

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always allows the executor by parol evidence to shew, he was meant to have the beneficial as well as the legal interest.

For Plaintiff.

This evidence is not to rebut a presumption, but to make a new additional agreement different from the written instrument; for that is the effect of parol evidence of her intention to go beyond the instruments. If that intent had been executed, when she was separately examined, viz. at the time of the surrender, it would have bound her. The husband was suable upon his bond. In *Tinney v. Tinney*, 3 *Atk.* 8, evidence to shew, *fême* intended to give up her dower at the time husband secured her a sum of money, in case she should survive him, refused.

Lord CHANCELLOR.

What do you say to the case put by the *Solicitor General*, supposing, the money had been paid to her, and she had afterwards given it to him?

For Plaintiff.

That is quite different. Either payment to her is payment to him; and her gift is nothing; as from the nature of the transaction she had by pledging her estate given it to him before the money paid; or payment to her amounts to an agreement by him, that it shall be to her separate use; for, if with a view to fraud upon her, it would have no effect. Then as to that she is constituted by his act a *fême sole*; and if she chooses to deliver it over, she acts upon it voluntarily according to the authority given to her. *Lord Kinnoul v. Money* proves the general principle. If the will had contained a sufficient expression \* of her intention, the claim would have been under the will, she had power to execute.

[ \*184 ]

Lord CHANCELLOR.

Parolevidence  
admissible to  
prove applica-  
tion for benefit  
of the wife or  
any relation of

Receive the evidence. The equity does not consist entirely in the circumstance of the money being borrowed, and made the debt of the husband; but at least in the application also: so, if the question was as to the application, that it was for the benefit of the wife, or any relation of her's, it clearly must be



be admitted. The single question here is, whether it can be admitted to prove, that at the time the money was raised, it was the intention of the wife to pass it to the husband as a gift to buy an estate, they both wished to buy. It is impossible to distinguish the case put by the *Solicitor General*, where the money was paid to the wife, and afterwards given to the husband by her, from the present; because that is only evidence of the wife's intention to give it to him; and the difference is too slender; if the Court was to go upon such slight differences there could be no getting at substantial justice: therefore admit the evidence.

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v.  
HOOPER.

For Plaintiff.

It is very singular, that she should say, she was better off with this small interest under the will, than with an estate the purchase-money of which was 7750*l*. How could she make such a gift? As she could mortgage her freehold by a fine, and her copyhold by a surrender, where there is a separate examination, she might declare the uses to the husband so as absolutely to exclude her claim; without that she could not: not by any paper, for that would have no operation; and if writing would have been void, still more any parol agreement. The evidence does not come up to that, which must be required, if parol is to be admitted at all, to get rid of this sort of right. It might be admitted to shew, it was to be raised for her; as if in conversation she had admitted, that it was raised for her children by a former husband: so, if she was to have the benefit of it after the death of her husband; but the fair result of this evidence, when stretched to the utmost, is nothing like such an agreement.

1791.  
Jan. 27.

Lord CHANCELLOR.

Lord Keeper *North* was of opinion, that though laid out in the improvement of her estate, it would not bar her right: 1*Vern.* 213; where her estate consisted of houses, which had been destroyed by the fire. What do you say to that part of her conduct, subsequent to the death of her husband; when she said, she would not raise this claim in prejudice of the legatees?

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CLINTON  
v.  
HOOPER.

For Plaintiff.

If it was an agreement, it was void, because there was no consideration : if a fraud upon the executor, though she might be bound to the extent of that fraud, it could be only upon that ground ; not upon any abandonment of her right ; but in that case it ought to be made out, that he paid in consequence of that ; but the contrary appears by the schedule to the answer.

Lord CHANCELLOR.

Heir at law would be barred of his right against personal assets by declaration, proved by parol, that he would not raise his claim ; or, even after legacies paid, affirming it : and wife's case is same as that of heir at law. Husband having paid part of mortgage upon wife's estate, in which she had joined, may by his indorsement charge it again to the same amount ; but not ultra.

[ \* 186 ]  
Husband acquires no interest in it by paying it off.

That seems to bear hardest upon your case. Take it as the case of an heir at law ; and that he made such a declaration ; or, even after the legacies were paid, affirmed it ; that parol conversation would be sufficient to bar his right : and my opinion is, that the case of the wife is the case of the heir at law. I will suppose, the legacies were paid before. There is no rule of law to prevent the wife from renouncing by parol this right : but first I will state, what her right is. I have looked into all the cases, I can find, upon it. The first is, 1 *Vern.* 41. All, the decision there amounts to, is, that the wife and husband, having joined in a mortgage for 400*l.* and he having paid part, and borrowed from the same mortgagee another sum, equal to what he had paid off, she was bound to pay the whole. In giving that opinion no question arose, how far the assets of the husband should exonerate her ; but the effect of it is, that from the moment she mortgaged, the husband might by his indorsement upon it charge the estate. There is no case yet, that, where they join, he shall by his own indorsement charge the estate ultra. In *Grey v. Kentish*, 1 *Atk.* 280, where a possibility of the wife was mortgaged ; and the question was between her and the assigness of the bankrupt ; though the main question was, how far the conveyance of the possibility was good at all ; yet Lord *Hardwicke* went into the nature of this right ; and \* said, if the husband had paid it off in his life, the estate should have been disencumbered : from which I collect, he would have acquired no interest in it by paying it off : and he adds, that, if he died without paying it off, she should have had it disencumbered. The rule I take to be universally this, that the title, she has, is precisely the same, as that of an heir at law ; because in

Tate

*Tate v. Austin*, 1 *P. Will.* 264, and 2 *Vern.* 689, though not the question in the cause, and consequently not weighed upon argument, yet the Court was very clear, that the wife cannot insist upon being paid in preference to onerous creditors. All the cases therefore concur to this; that where the debt is originally the debt of the husband, his personal estate is bound to pay it in the first instance (29); and the wife will be entitled to be exonerated, not upon any right arising out of the contract; but because it is the debt of the husband; and his personal estate is the primary fund. *Bagot v. Oughton*, 1 *P. Will.* 347: the wife's estate was mortgaged before the marriage, and transferred after; and the husband joined, and covenanted to pay the money: still it was held, that his personal estate should not exonerate that real estate; because the debt was not substantially and in effect his, though he covenanted to pay: but being a debt existing upon the fund before, his covenant was collateral in support of the debt. There is a reference in that case to the well known case of *Evelyn v. Evelyn*, and some others; which put that matter quite at rest as between the heir and executor. The next question is that, which arises in *Lewis v. Nangle*, *Amb.* 150. There *Lord Hardwicke* would not distinguish between the one sum and the other. That does not apply to the case of *Lord Kinnoul v. Money*; which in that very point is different from it. I have a good note of *Lord Kinnoul v. Money* from Mr. Ord. There Miss *Earl* had a real estate, which was itself subject to a certain extent, and the general estate of her father, subject to the amount of 2500*l.* Before her marriage it was mortgaged to *Wyat* for that sum, being her own debt, or more properly that of her ancestor. After the marriage, when it was settled in very strict settlement, with only a power after the limitations for life and in tail (which limitations in tail were gone by the death of the son while an infant) to charge by will, and to act upon it during coverture as fully as any woman could receive such power by settlement; the husband had occasion to raise 3000*l.* upon the estate; that was done by fine, and not by virtue of her power; for then it would not have affected it in his life, nor indeed in her's: but that sum was afterwards raised for his benefit; and then a mortgage was

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Wife not to be paid in preference to onerous creditors.

Wife's right not on the contract, but because, being husband's debt, his personal estate bound in the first instance.

(29) *Aguilar v. Aguilar*, 3 *Madd.* 414.

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Not necessary to appear on the instruments that it is the debt of the wife; but may be proved *aliunde*.

Where the debt is not originally the husband's, his covenant to pay is only collateral; and will not make it his: but *quære* whether so against creditors.

was made for the whole sum, which was 7000*l.* and 1000*l.* interest incurred, in all 8000*l.* This was expressed to be done by virtue of her power. Lord *Hardwicke* referred it to the Master to see, what was raised for the wife's debt, and what for the husband's use. In 1767 before the report it came on for a re-hearing before Lord *Camden*; and they insisted, that the reference was wrong; but, worse, than that, that there ought to have been an immediate decree: and the whole ought to have been charged upon the estate of the wife. But Lord *Camden* saw no reason to overturn that interlocutory decree; and therefore at his recommendation they agreed, that it should be confirmed, and the cause to stand for farther directions; and he confirmed the decree *in omnibus*; and particularly said, that the wife's estate was not to be subject to any part, except what was for her; and that *Lewis v. Nangle* turned upon different circumstances, not upon the general principle. This determination, thus confirmed, carries with it this inference of a position, though not directly in question, that it is not necessary to appear upon the face of the deed to lead the uses of the fine, that it was the debt of the wife; but it may be proved *aliunde*. That inference also arises in *Bagot v. Oughton*; but more strongly in *Lord Kinnoul v. Money*. If it ever was the debt of the husband, he is bound to pay it from his personal assets; but the circumstance of his covenanting, when the debt was not contracted by himself, would not make it his, because his covenant may be otherwise explained; namely, that it was meant as a farther security for it; and that is the reason of *Evelyn v. Evelyn*; for there the husband covenanted; but because the debt was not contracted by him for himself, his covenant was only considered as collateral (30). I do not say, it would be so as against creditors; that would be

(30) See Mr. *Cox's* note, 2 *P. Will.* 654, *Evelyn v. Evelyn*. Post, *Hamilton v. Worley*, Vol. II, 62. *Woods v. Huntingford*, III, 128. *Butler v. Butler*, V, 534. *Waring v. Ward*, VII, 332. *Earl of Oxford v. Lady Rodney*, XIV, 417. *Lechmere v. Charlton*, XV, 193. Portions to be raised by a trust term in a marriage settlement: the real estate was held the primary fund; and a covenant by the settler auxiliary: *Pitt v. Pitt*, 1 *Turn.* 180. So upon a charge under a power by tenant for life, with the ultimate remainder in fee. *Ex parte Earl Digby*, 1 *Jac.* 235.

be another question. In *Lord Kinnoul v. Money* the position is laid down, that parol evidence is admissible to prove, that the debt, which the husband covenanted to pay, is the debt of another, not his own; consequently that his personal estate is not to be charged in favour of the heir or wife. If this was an original question, perhaps it might be thought hard, that where the wife appears to have subjected her estate to a debt of the husband, that inference should be made to consider her as a *feme sole*, and coming under an obligation, as if a *feme sole*, to pay it. Perhaps it is considered rather too figuratively in saying, \*the marriage is dissolved in that respect. That is not in Mr. Ord's note; nor any trace of it in *Tate v. Austin* and the other cases. They say, the Court will not infer an equitable assumpsit contrary to the tenor of the obligation subsisting between husband and wife, who cannot contract with each other directly without trustees. Then to consider the case put by the *Solicitor General* of money paid to the wife without writing, and with the privity of the husband: and if made out satisfactorily to the Court, that she could dispose of it, as she pleased; or suppose, she kept it herself, so as to be able to make a will, &c. with all the consequential rights of personal estate; I see no reason, why the Court should not, proceeding upon the same principle, declare, that that money was not the debt of the husband. It being transferred to her, and so as to be attended with all the equitable consequences of separate estate, it never was his; so the whole obligation upon him consisted in his covenant. If by a distinct transfer and independent transaction, without any relation to the original matter, she, having absolute power to dispose, gave it to the husband; that circumstance perhaps would not reach back to the original contract; but still that reason itself is under the principle before mentioned. Upon the next question I am rather anxious to say something: for I now think, I gave too extensive an opinion the other day upon admitting the evidence. The case without the parol evidence is that of a wife, who had subjected her estate by joining in a mortgage. The allegation is that in the case of *Tate v. Austin*; which the Court would not allow there: viz. that it is a gift to the husband. Supposing it so, the transaction must be, that she raised a sum of money upon the estate; which might have been done

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Court will not infer an equitable assumpsit contrary to the tenor of the obligation subsisting between husband and wife. Where the money was paid to wife with privity of husband, without writing, so as to appear that she could dispose of it in her life or by will, not to be considered the debt of husband.

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[ \*189 ]

done by fine to trustees upon trust to raise by sale or mortgage a sum for the benefit of the husband: and if it was a conveyance of that sort, it is manifest, that it never was a debt by him; but what he had an original right to without any obligation ever to repay. When it is a transaction purporting not only by the instruments themselves, but by all the other evidence, except parol evidence, to be a transaction to raise money for him; and he therefore bound to pay; I have great doubts, whether it is possible to apply parol evidence to that transaction itself to prove it different. If the evidence were, that the wife's debts were paid by it; or of any particular application different from paying it to him; I see no reason against admitting her parol declarations to that extent: but when I say that; I go far beyond all the cases, which are, where the fact was proved, that the money was paid to another account; and never did come to his account, because it never was received by him at all. But this would be carrying the rule of evidence too far; therefore if it depended entirely upon that, I should think, she ought to be exonerated; for it falls first upon his personal estate; and the law will leave it, where it falls. But when I have put it as between heir and executor, as the cases oblige me to put it for the reason mentioned, because an assumpsit between husband and wife will not be raised more in equity than at law; if the heir tells the executor, he will not raise his claim, it is impossible, that he can be exonerated; not upon the score of fraud, of the executor being drawn in, for then the legatees would have received it injuriously: but I think, the concession of the heir goes farther; and that it is not material, whether the legacies were paid before this concession, or after: for if the executor having paid them is suffered to lie by, and consider himself as at rest; and then the heir retracts; it is injurious to the executor; and the heir may, by telling him that but himself. She has done so; and therefore the bill must be dismissed.

## PYBUS v. SMITH.

1790.

June 12th.

3Bro.C.C.339.

**UPON** the marriage of the defendant *Vernon* with *Anna Maria Vernon* it was referred to the Master to make a proper settlement of her real and personal property, consisting of freehold estate, and Bank and other annuities. The first proposals of the husband for that purpose were rejected. A settlement was accordingly made with the approbation of the Master vesting both real and personal in trustees upon trust, as to the real, to permit *A. M. Vernon* to receive the rents and profits for life, or to pay them to such persons, in such proportions, and for such uses, as she should by any deed or writing under her hand, with or without power of revocation, from time to time appoint; and in default of such appointment to her sole and separate use for life; and after her decease, if no children, (which \* was the event) to such persons, in such estates and proportions, for such uses, chargeable with such sums, and subject to such powers as she should, whether covert or sole, by any deed or writing under her hand and seal, to be by her duly executed in the presence of two or more witnesses appoint. And in default of such appointment in trust for her, her heirs and assigns for ever. As to the personal in the same manner; except, that in her power of appointment, the words "*from time to time*" were omitted; and in case of no disposition, to her, her executors, and administrators. Plaintiffs were in the habit of supplying *Vernon* with cash by accepting bills, and discounting bills and notes, and upon account of his having considerably overdrawn, they in August, 1785, required security from him. Accordingly upon the 15th August, 1785, by indenture between the Plaintiffs and *Vernon*, and his wife, reciting the settlement, the security was given upon her separate property both real and personal. Upon the 16th August she by deed-poll reciting, that it was in consideration of making a proper provision for her husband, appointed the rents and profits of the real estate to be paid to him by the trustees, and also appointed to him

*Fême covert* is a *fême sole*, as far as the instrument creating her separate estate makes her proprietor; and if she pledges it according to her power, the trustees must hold to the uses she appoints; but, where [\*190] she according to her power appointed for the benefit of her husband, an inquiry into the circumstances was directed.

*Quære*, whether the words "*from time to time*" in a power to appoint rents and profits of real estate, but omitted in the power to appoint the produce of the personal estate, will prevent a sweep-

ing appointment of the whole; the power extending to the whole after death.

Trustees are mere stakeholders; and cannot be affected with more than they actually received without wilful default.



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her reversion in fee, and also in the same manner the personal and its produce. Upon the 6th and 7th *December*, 1786, there was a new indenture of lease and release between Plaintiffs and *Vernon*, but to which the wife was not a party; reciting the former indenture and deed-poll, and by it in consideration of sums due, and to become due, to Plaintiffs, this property was again made liable to them. In 1788 *Vernon* became a bankrupt, and the bill was brought against him, his wife, and the trustees, to have the benefit of these two securities, and for an account of money due to the Plaintiffs upon certain notes and bills of exchange, and of all sums the trustees did might have received since, they had notice.

Solicitor General, for Plaintiff.

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The wife insists, that these deeds do not bind her at all. She is in this Court to be considered as a *fême sole*. As to the first instrument, there is no case, where a woman may not, if there is a power in the settlement, pledge the produce of her separate estate as a security for her husband's debts. The power enabled her to execute this either with or without power of revocation, and she has not reserved such power; she might have executed a voluntary gift of, and has divested herself of it. The variation * of expression between the limitations of the real and personal by omitting the words "*from time to time*" in settling the latter, was, I apprehend, a mere slip; but the expression in both cases comprehends no more, than if it had been to pay to the separate use of the wife; the other is only accumulation. This bill only seeks to affect her life estate, and the reversionary interest in case of no children, which is the case at present. In 1 *Brown's Chan. Rep.* 16. where a married woman had a power over her separate property, the husband borrowed 50*l.* upon his and his wife's bond; and upon a bill filed your Lordship thought, this was to be considered as the case of a *fême sole*, and gave the relief prayed. If a *fême covert* has a power to receive to her separate use, and to appoint; and she files a bill jointly with her husband for an account, and submits to apply the profits in payment of her husband's debts; this bill will itself amount to an appointment, and the Court will act upon it as such; *Allen v. Papworth*, 1 *Ves.* 163. Such an appointment is good, unless

there is proof of ill usage or duress by the husband; and a *fême covert* is in this Court considered as a *fême sole* as to separate estate, *Grigby v. Cox*, 1 *Ves.* 517, *Norton v. Turvill*, 2 *P. Will.* 144, *Peacock v. Monk*, 2 *Ves.* 190. As to the first instrument it would be a fraud upon the creditors, if this is not good. Upon these cases, and particularly in what Lord *Hardwicke* said in *Grigby v. Cox*, we may infer, that an appointment to a purchaser cannot be bad. Therefore Plaintiffs are entitled to the benefit of the first of these deeds, and also of the second, for by the deed poll the equity of redemption was given absolutely to the husband.

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Mr. *Lloyd*, for Mrs. *Vernon*.

Mrs. *Vernon* says, she was imposed upon, and that she thought she was only charging the reversion in case of her death without issue. They must prove, that they read this instrument to her, and that she understood it; for the trustees were not consulted, and there was only one solicitor employed for all parties.

For Plaintiff.

The same objection was made in *Grigby v. Cox*; and overruled.

Mr. *Lloyd*.

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In that case (31) the circumstances do not appear. This settlement was not whilst she was unmarried, for your Lordship thought, the proposals of the husband were improper, and referred it to the Master to prepare a proper settlement. It appears, she would not have done this, if not either very well or very ill used, both of which will raise the suspicion of the Court (32). The settlement was upon the 6th of *May*, 1785, and before she received any payment under it, viz. in *August* she concurred in the first security. There was no transaction or communication with the trustees. This was stripping her of what


(31) In 1 *Bro. C. C.* 17, Lord *Thurlow* says, the defect of that case is, that it does not state the trust. But in page 20 he seems to approve of the principle of the case.
 (32) 1 *Ves.* 518.

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what the Court had taken care to provide for her. Very little is due to the Plaintiffs under the trusts of the first deed, but upon the 16th of *August*, the very next day, she makes without any consideration an absolute appointment in favour of her husband of all her property, stripping herself of every thing, and that is the security, they depend upon. Plaintiffs deserve no favour. They come with full notice of this settlement, and are bound to take notice of what was the true intention of the trusts. There is no case shewing, this will be good under such circumstances. It could only be good upon the husband's proving, that no improper use was made of his authority, and her consent ought to be shewn. This is no more than a mere agreement; because the legal estate is in the trustees. Counsel always advise creditors never to take a security from a married woman, unless she consents, or ratifies it, being examined. The constant practice at the Rolls shews this. If this is allowed, a Court of Equity does no service to the married woman by the settlement, though it may to the children of the marriage, for she may part with her property without the intervention of a third person. If it was copyhold, there must be a surrender, and consequently the intervention of a third person not interested. It would have been better to have left the money in Court, than to have made this settlement; for then the Court would not have parted with it without having her consent, if they petitioned to have it. The true question is, what is the real \*intention of the trusts of such a settlement as this. If that was, that she should not strip herself of all by signing her name, these persons cannot complain, having full notice of the trusts, but must be bound by it. When the Court vested this in trustees to pay into the proper hands of the married woman, or such other person as she should appoint, it is impossible, they could intend, that she should at one stroke without the intervention of trustees authorize them to pay it to another person, who never informed them, till the close of the transaction, that he was treating with the husband and wife. It will have quite the contrary effect from what was intended, if without any evidence they can produce a deed signed and delivered by her, though it does not appear, that she understood it, or that it was not by coercion. It was meant by the Court to do all, that was possible for her. But if they are entitled to the benefit of  
the

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the first deed, (which I deny) they cannot be to that of the second; for that was founded upon a deed, by which he got absolute dominion over all her property real and personal without communication to the trustees; and no case is cited, where the Court carried such a contract (for it is no more) into execution; or the *dicta* stated are only, that as between those claiming under her and the husband, if he has made a contract, that she shall be so considered, he shall not run away with her property from them. But under these circumstances when she says she has been imposed upon in obtaining it, the Court has never gone so far. It was the practice of the Court formerly not to give up the wife's property, though she appeared and consented, and there is a case to that effect.

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For Plaintiff.

There is not a hint, that this was improperly obtained; she only says, she did not know the extent of the first deed.

Lord CHANCELLOR.

You cannot affect the trustees with more, than they actually received without wilful default. They are mere stake holders. The rule is, that she is sole, so far as she has a power of appointment, but with any limitations described in the deed giving her that power. If the trust is to pay the rents and profits to her upon any instrument signed by her since the last pay-day, an instrument signed before would not do. If, as Lord *Hardwicke* says, the concurrence of the trustees is necessary, it would not do without it. So far forth as the instrument creating her separate estate makes her proprietor, so far is she a *sole*; and if she has pledged her estate according to her power, the trustees must hold it to the uses, she appoints. The doubt, I have entertained, is, whether the words "*from time to time*" will not make it impossible for her to make a sweeping appointment of the whole. They do not occur as to the annuities. But you must affect the deeds in some way. Suppose I send it to the Master to inquire, under what circumstances they were obtained. The Master must report it, in order to lay a ground. And let the inquiry be both of the first and second deeds, how they were executed; for it is very fit in case of a married woman, that the Court should know, how

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how she has disposed of her property. These cases have not been sufficiently attended to (33).

(33) The cause came on upon the report *August* 3d, 1791, when, it appearing the wife knew what she was about, *Lord Chancellor* said, in that case the Court allows her alienation of separate property. It was referred to the Master to inquire, whether Plaintiff had any other security. 3 *Bro. C. C.* 340. See *Fettiplace v. Gorges*, ante, 46, and post, Vol. V, 17, the note to *Chassaing v. Parsonage. Sperling v. Rockfort*, VIII, 164. *Rich v. Cockell*, IX, 369, 486, 520. *Parkes v. White*, XI, 209. *Witts v. Dawkins*, XII, 501. *Sturgis v. Corp.* XIII, 190. XVIII, 434. *Jackson v. Hobhouse*, 2 *Mer.* 483. *Francis v. Wigzell*, 1 *Madd.* 258. *Ritchie v. Broadbent*, 2 *Jac. & Walk.* 456.

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June 30th.

## BLAKE v. BUNBURY.

Tenant for life subject to a trust term not let into possession before account; nor till the trust is executed, unless on paying into Court a sum sufficient to answer it; or where the best way of performing the trust appears to be by letting him into possession.

SIR *Patrick Blake* was tenant for life by the will of his father, subject to a term, under which the real estate was charged with a sum sufficient with the personal to answer the purposes of the trust. Upon coming of age he filed a bill; and a general account was directed of testator's estates, and of debts, legacies, and funeral expences.

*Solicitor General*, for Plaintiff

Desired, that he might be immediately let into possession; insisting that he was in the common case of tenant for life, where the Court is in the constant habit of letting into possession upon keeping down the interest; and that in case of failure a receiver may be appointed. The real estate, he said, would be liable to a very small amount: he complained in strong terms of the conduct of the trustees.

*Lord CHANCELLOR.*

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Infant ought to sue by next friend; not to wait till of age.

This ought to have been finished long ago; for, though the Plaintiff is but just of age, he might have sued by his next friend. But it is impossible for me to let him into possession, till I have the account before me, and even till the trusts are executed; unless, as he now offers, he pays into Court a sum sufficient to answer all the purposes of the trust. Whenever he does that, I will let him into immediate possession. The Court perhaps

perhaps has let tenant for life into possession, where it has seen, that the best way of performing the trusts would be by letting him into possession. As where an annuity of 100*l.* a year is charged upon an estate of 5000*l.* a year. But till the account is taken, I do not know but the purposes of the trust may take up the whole; and if I was to do it now, perhaps I should only have to resume the estate (34).

(34) *Post*, 514. As to letting equitable tenant for life into possession, see *Tidd v. Lister*, 5 *Madd.* 429.

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GREY, *Ex parte*.

**P**ETITION by the commissioners and assignees under a commission of bankruptcy, that the time for the surrender of the bankrupt might be enlarged to twenty-eight days; not having surrendered within the time appointed in the Gazette.

Mr. *Hardinge*, for the petition

Admitted, that the commissioners had behaved extremely ill, and there was no justification for their conduct. They said, the bankrupt did attend at the time, but that they were absent voting at an election.

Lord CHANCELLOR.

It certainly was very great misconduct in the commissioners. This ought to have been the petition of the bankrupt, complaining that he was disappointed in making his surrender. If he was tried for felony, it certainly would be a good defence to say, he had made an attempt to surrender, and could not (35). All, that could be done upon it, would be to appoint another day, where he had so failed. Take the common order.

(35) Otherwise, where the failure is by the bankrupt; *Ex parte Ricketts*, post, Vol. VI, 445, and the note. In 1823 *Thomas Thurtell*, a bankrupt, was prevented from surrendering within the time appointed, being confined in Newgate under a criminal charge of a conspiracy; and the keeper declining on the 42d day to bring him to the Court of the Commissioners,

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Bankrupt was prevented from surrendering because the Commissioners did not attend at the day; on petition of the Commissioners another day was appointed. The Court blamed their conduct, and said, the petition ought to have been by the bankrupt.

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July 1st.

DUNDAS v. DUTENS (36).

1 *Eden*, 55.

Settlement after marriage of the wife's property, reciting and in pursuance of a parol agreement before, in trust as to part of the produce to the separate use of the wife, as to the rest for husband for life, then for wife for life, then among the children according to appointment of the survivor, good against creditors of the husband. Their bill to set it aside was dismissed with costs, and Defendants were held entitled to that judgment even against a Plaintiff, who was made so without authority: but his

**H**ARRIET DUTENS being entitled under the will of *Peter Dutens* her father to 1000*l.* stock in the *three per cents*, and to some other stock; and also to a share of the residue, married *James Callender*. In 1783, subsequent to the marriage, a settlement by indenture was made, reciting a parol agreement before the marriage to settle her property; and settling it in pursuance of that agreement in trustees upon trust out of the annual proceeds to pay 100*l.* a year to the separate use of the wife, and to pay the remainder of the produce to the husband for life, then to the wife for life, then among the children of the marriage as the survivor should appoint. The husband assigned his life interest to trustees upon trust to pay to *Fitter*. *Harriet Callender* the wife being dead, a bill was filed in the name of Sir *Thomas Dundas* a creditor for 5000*l.* Sir *William Murray*, and other creditors, against *James Callender*, who had quitted the kingdom, and was at this time in *Scotland*, *Elizabeth Dutens* the widow and only surviving executrix of the testator *Peter Dutens*, the children of *Callender*; *Fitter* as assignee of *Callender*'s life interest, and others; praying, that the settlement, and the assignment in trust for the Defendant *Fitter*, which was founded upon it, might be declared fraudulent, and void against creditors, and be set aside; and for an account of the effects of the testator, his debts, legacies, and funeral expences; and that the residue might be ascertained, and that such share of the residue, to which *Harriet Callender* was entitled, yet unpaid, and so much of the stock as she was entitled to, yet remaining unsold, should be applied to satisfy these creditors. Upon the 30th *June*, 1790, a motion was made upon the part of Sir *Thomas Dundas* to have his name

(36) 2 *Cox*, 235.

whole expence, and also the whole expence above the costs taxed of all Defendants except the husband were decreed to be paid by the Solicitor for Plaintiffs; the transaction being considered as a combination between the husband, the creditors, who authorized the bill, and the Solicitor to defraud the children. Choses in action, viz. stock, debts, &c. are not liable to creditors; they cannot be taken on a *levari facias*, and cannot be touched in Equity. Relief prayed by the bill, but given up at the hearing, must be expressly waived on the record.

name struck out of the bill as Plaintiff, and to have the Solicitor committed, on the ground, that he had no authority for making Sir *Thomas* a Plaintiff. The other creditors had signed such authority. The Solicitor in his defence alleged in Court, that he had been deceived by *Callender*; who promised to procure him an authority from Sir *Thomas Dundas*, with whom he was upon terms of intimacy, as appeared from a letter read in Court from Sir *Thomas Dundas* to *Callender*; \* that though he was the Solicitor, who filed the bill, yet he was not the original Solicitor in the cause; and that he had offered and was now ready to indemnify Sir *Thomas Dundas*; and he made affidavits to this effect.

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*Lord* CHANCELLOR said

It seemed to be a combination between *Callender* and his creditors to cheat his own children, and that it was a very scandalous transaction, and reflected great disgrace upon the Court, and that he should certainly make the Solicitor pay the costs as between attorney and client; and as the cause was set down for hearing, he ordered the motion to stand over, till the cause should come on; which happened the next day.

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The cause coming on to be heard, the Defendant *Fitter* by his answer stated, that in consequence of a decree of this Court upon the assignment to him he was nearly satisfied.

*Mr. Mitford*, for Defendants,

Objected, that the suit was defective for want of a party; as the bill had not been revived against the representative of *Elizabeth Dutens*, who was dead.

*Solicitor General*, for Plaintiffs,

As that is the case, I can ask no relief, except as to the stock of *Harriet Callender*.

*Lord* CHANCELLOR.

You must expressly waive the other relief prayed upon the record.

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For Plaintiff.

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As to the stock this settlement is void against creditors; and the Court will give execution against this fund. There are authorities for it. *Horn v. Horn*, *Amb. Rep.* 79 (37), though it is not a decision, yet it states in the *nota bene* at the end of the case the Reporter's express opinion upon it, and Lord *Hardwicke* in that case seems to have been clearly of that opinion. \* *Taylor v. Jones*, 2 *Atk.* 600, a husband, who had 1733*l.* stock devised to him, after marriage settled it for himself for life, then for his wife for life, and afterwards for the benefit of his children; this settlement was decreed to be void against creditors both before and after marriage; and the trust estate was decreed to be sold; and the produce applied for the payment of his debts (38). The *Master of the Rolls* thought it fraudulent as to creditors, as within the 13th *Eliz.* though the consideration was good as between those making it, yet not as to creditors. The *Register* has been examined upon that case, and one circumstance appears, which is not in the report; namely, that a letter of license was given to the husband; but by agreement it was not to prevent the creditors from proceeding against his effects, though they were not to proceed against his person, but that does not seem to make any difference. That sum of 1000*l.* was assigned to Mrs. *Candler*, and stood in her name. With regard to that sum, the moment of the marriage he could insist upon payment of the stock standing in her name immediately, without coming here. The second point is, that this was fraudulent as to creditors.

Lord CHANCELLOR.

Is there any case, where a man having stock in his own name has been sued for the purpose of having it applied to satisfy creditors? Those things, such as stock, debts, &c. being choses in action are not liable. They could not be taken upon a *levari facias*. I did not think, you could have got so near it

(37) *Lord Chancellor*, after contains the private opinion of reading this case, observed, that the reporter.

there was nothing in the case (38) See also *King v. Dupine*, applicable; but only the *nota* in Mr. *Sanders's* note to that *bene* at the bottom, which only case.



it as that case in *Atkyns*. If the Court was of opinion as to that letter of license, that there was any lien upon the stock, by which it was capable of being affected, that might be the foundation of it; but if not, it is quite new to me, that this Court can touch it. I have never heard of such a thing (39). Upon the second point as to the settlement, I should be glad to hear, how you support it; though it is mere matter of curiosity, if the first is against you.

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For Plaintiff.

However your Lordship may think this doctrine hard upon children, yet in a Court of Equity no proposition is more clear, than that a parol agreement or settlement previous to marriage is absolutely null and void; and that the marriage is not a part execution of such agreement, upon which the Court can proceed to a farther execution of it, being void under the statute. \*In that case in *Atkyns*, the *Master of the Rolls*, speaking of the hardship upon the wife and children, says, he must decree for creditors though against a wife and children, because it is impossible, if creditors do not get their debts, that their wives and children may be reduced to want. But Plaintiffs deny, that there was any agreement before marriage; it is simply recited, that it had been agreed; and the case says, a parol agreement followed by a marriage cannot be executed in this Court. Otherwise no settlement after marriage could be bad.

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For Defendant.

In *Cro. Jac.* 454, there is a case, *Dame Griffin v. Stanhope*, where a settlement after marriage, founded upon a promise of the husband before marriage, upon which reposing confidence she married him, was held not to be fraudulent. 1 *Vent.* 194, *Sir Ralph Bovy's case* upon a promise before marriage. 2 *Lev.* 146, where though the settlement was determined to be fraudulent, yet by the fourth resolution of the Court it would

(39) Post, *Simmonds v. Lord Kinnaird*, Vol. IV, 735. *Nantes v. Corrock*, IX, 177, 182. *Rider v. Kidder*, X, 360. *The King v. Capper*, 5 *Price*, 217. This part of Lord *Thurlow's* judgment seems to have been overlooked by Lord *Manners*, 1 *Ball & Beat.* 390.



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Parol agreement for a settlement upon marriage cannot be sued on afterwards on ground of part performance; but no case of a settlement reciting an agreement before marriage is within the statute. Refusal after marriage to perform a previous agreement to settle is a fraud, against which equity will relieve.

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would have been different, if there had been an agreement or promise before marriage.

Lord CHANCELLOR.

If the husband made an agreement, that he would settle, and then in fraud of that agreement got married, would not he be bound by it (40)? I thought, there was a case in point for that. What the settlement might be, if made upon himself after marriage is another question. But in *Eq. Cas. Ab.* where there was an agreement before marriage, and the father drew the man in, and was privy to his having married without any execution, and then refused to execute, relief was given. If in this case there was an agreement before marriage, and afterwards he drew her in to be married, and then refused to perform it, it appears to me to be that kind of fraud, against which this Court will relieve. If there is a parol agreement for a settlement upon marriage, after marriage a suit upon the ground of part performance would not do, because the statute is expressed in that manner; but is there any case, where in the settlement the parties recite an agreement before marriage, in which it has been considered as within the statute?

\* Let the bill be dismissed with costs to all the Defendants, except *Callender*, to be taxed against the Plaintiffs; and let the Master compute the whole expence, Sir *Thomas Dundas* has incurred in this cause, which shall be paid by the Solicitor for the Plaintiffs. Let the Master also compute the expences incurred by the several Defendants, except *Callender*, over and above the costs taxed against Plaintiffs, and let them also be paid by Plaintiffs Solicitor. If a man will do such a thing as this in a Court of Justice, and bring a person's name on the record without any authority, and if it is attended as in this case with a combination to bring him and *Callender* forward in order to cheat the children, I ought not to permit the children, or the estate, or any one, to receive any damage; and I do this upon reading the affidavit of the Solicitor.

(40) In case of fraud equity only relied on promises, honour, would relieve. *Lady Montacute* &c. *ibid.* See *Randall v. Morgan*, post, Vol. XII, 67. *v. Maxwell*, 1 *P. Will.* 620; but not where no fraud, but the party

*Mr. Mansfield, for Sir Thomas Dundas*

Insisted, that, as his name was used without his authority, he was not to pay Defendants costs; but his name ought to be struck out, which, he said, would be immediately done at law; and compared it to the case of forging a name.

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*Lord CHANCELLOR.*

I doubt, whether it would be so at law, and whether I can deliver him from the costs to be taxed against the Plaintiffs. I cannot deprive Defendants of their right; they are entitled to this judgment. The Defendants must have their remedy against the Plaintiffs, and this Plaintiff against him, who pretended to be his agent. If a man's name stands upon the record down to the hearing, which I can hardly conceive, without his knowing it, he must pay costs, if the bill is dismissed with costs. The case of forging a name is not parallel; it is different from that of a name standing upon the record. At law there would be a remedy upon the record for the costs, and the Court would act according to their discretion. But it is a mere question of form; for he will have his expences against the Solicitor, who offers to pay into Court immediately 200*l.* to answer the costs; and being a question of form, I wish it to be decided according to the \* strict principle of law. This is my present opinion: but I will think of this point, before the order issues. You may save the expence of going before the Master, if he will admit the bills of the Solicitors.



[ \*201 ]

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No alteration was made in this decree (41).

(41) In 1 *Salk.* 88, attorney appeared without warrant: judgment against his client; which, being regular, was not set aside; for Plaintiff, being in no fault, ought not to suffer; and the attorney was able and responsible: *secus*, if he was not responsible, or suspicious; as Defendant, having no remedy, might be undone. *Wilson v. Wilson, Wade v. Stanley*, 1 *Jac. & Walk.* 457, 674, and the references in the note page 459. *Wright v. Castle*, 3 *Mer.* 12, *Beames on Costs*, 144, note 11.

1790.

July 2d.

## RASHLEIGH v. MASTER.

3 Bro. C.C. 99.


Personal estate to be laid out in land, but lent on mortgage instead, considered as land, having been always out in trustees, and the uses never united with the possession: and passed by such general words in a will, as would pass land; as "all my estates, &c. whatsoever and wheresoever."

**B**Y articles previous, to the marriage of the late *Gilbert Lord Coventry* with *Miss Master*, reciting her portion to be 10,000*l.* it was agreed, that 5000*l.* of it should be laid out in the purchase of land, to be settled to the following uses; viz. to *Lord Coventry* for life, then to *Lady Coventry* for life in bar of dower, then to the younger children of the marriage according to the appointment of *Lord Coventry*; in default of appointment among all the children; in default of such issue to *Lord Coventry*; in fee. That sum was vested in trustees for that purpose, but was lent upon mortgage, instead of being laid out in land. In 1719 *Lord Coventry* died without issue of this marriage, leaving *Lady Ann*, his daughter by a former marriage, his heir at law. In 1720 a bill was filed to have this 5000*l.* and the interest laid out in land; and it was ordered, that the interest should be paid to the Plaintiffs in that bill; and the 5000*l.* was afterwards decreed to be laid out in land; but, instead of being so laid out, it was applied, together with 18*l.* of *Lady Coventry's*, to the purchase of 4800*l.* Bank Annuities; which was vested in the Defendant as trustee for *Lady Coventry* for life.

*Sir Coventry Carew*, the son of *Lady Ann Coventry*, and as such, the heir at law of *Lord Coventry*, by his will made the following disposition:

"As to all my lands and estates, and also my goods and chattels, and to prevent all disputes after my death, I give, \*devise, and bequeath as follows:" then he proceeds to make a great variety of dispositions both of real and personal estate; and then gives to *Jonathan Rashleigh*, his heirs and assigns for ever, his mansion-house (naming it) and two tenements (describing them) in the parish of *St. Minvah* in the county of *Cornwall*, and all the lands enjoyed with the mansion-house, and two bartons of *Rosara* and *Llangullo*, and several estates in *Cornwall*, which he described; and then proceeds to give all other his messuages, lands, tenements, and hereditaments whatsoever and wheresoever situate, not herein before by him given or disposed, with the courts, franchises, royalties, &c. and all accommodations and appurtenances whatsoever, and all remainder

remainder and remainders, reversion and reversions, rents and duties, and all annual profits, &c. to have and to hold them all (running through their descriptions again) as to such part, in which his wife has an estate for life for her jointure, from her decease, and all his other lands, tenements, and hereditaments whatsoever not before given, and every part and parcel thereof immediately from his decease, to *Jonathan Rashleigh*, his heirs and assigns for ever. He then charged all his real with his debts and legacies. Then he recited a sum of 16,000*l.* which was to have been laid out in land for younger children, with the ultimate remainder to himself in fee; but which had been lent upon mortgage, instead of being so laid out; and gave all his right, title, and interest in that sum to his wife and two others (which three persons he appointed executors of his will) upon trust to pay a sum of money due to *Rashleigh* upon bond; then in ease and discharge of his real estate in payment of debts, legacies, and funeral expences; and directed the surplus to be divided among the trustees, share and share alike, as tenants in common, for their own use. He likewise charged his estate with payment of 250*l.* a year, which, he recited, his father was obliged to pay to the Countess Dowager of *Coventry*, her executors and administrators. Lady *Coventry* died in 1788, and left the Defendant her executor. The bill was brought by *Rashleigh*, the son, praying that the Defendant might set forth, what interest he has in that sum of 4800*l.* Bank Annuities, and may be declared a trustee for the Plaintiff; and may account for the interest and dividends accrued since the death of Lady *Coventry*; and that a transfer of the stock may be made to the Plaintiff, instead of having the money laid out in land according to the settlement.

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Mr. *Mitford*, for Plaintiff.

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Sir *Coventry Carew* by that will died perfectly testate, and therefore the heir at law can claim nothing. The question is, whether this fund belongs to the person claiming the real estate, or to those claiming the personal. It has always been out in trustees, and was always real; and therefore there is nothing to turn it into personal. It was the intention of Sir *Coventry Carew* the testator, that the personal should be applied  
in

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in the first instance as a primary fund in exoneration of the real; and that all the residue of the real should go to the Plaintiff. The only doubt is, whether the words are sufficiently comprehensive to carry this stock; whether there is not something of locality to prevent their operation. *Guidot v. Guidot*, 3 *Atk.* 254, money agreed to be laid out in land, which never was done, was taken to be land according to the rule of equity, that what ought to be done is to be considered as done. Lord *Hardwicke* in that case said, that, if it had not been for the locality, there could have been no doubt; but that the word “*elsewhere*” comprehended every thing; and he referred to the case of *Linguen v. Souray*, *Pre. Chan.* 400. 1 *P. Will.* 172, where the word “*elsewhere*” had the same effect.

Mr. *Hardinge*, for the parties claiming the personal estate, viz. the executors of the wife, and the two other executors of Sir *Coventry Carew*,

Observing, that the testator had not given the personal estate in general words, but as describing a particular mortgage, gave up the point,

Mr. *Mansfield* and Mr. *Stanley*, for Sir *Charles Bampfylde*, heir at law.

There is nothing in the will passing this property to the Plaintiffs. As far as relates to the present question, this sum of 16,000*l.* is precisely in the same situation with this fund, and he disposed particularly of that. The result of the will is, that having a right to dispose of this 5000*l.* and 16,000*l.* and several real estates, he does it in this way: some of the lands, he has given to *Rashleigh*, were in jointure; he takes notice of that, and gives him the reversion of them; the others he gives to be held immediately after his decease. The 5000*l.* he could not give so, Lady *Coventry* being tenant for life of that sum; so he could not have had that in his contemplation at the time

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* of making his will. If it had occurred to him, perhaps he would have given this 5000*l.* to the same persons, to whom he had given the 16,000*l.* or to somebody else, but he is quite silent upon it. Every word used in the devise to *Rashleigh* is as applicable to real estate, as terms can be. He has filled it with Courts, &c. and all the appurtenances applicable to real.

The

The general words seem to be used not with reference to any property of this kind, but merely because he had given lands in four or five different parishes, for fear of any mis-description. The words "*messuages, lands, tenements and hereditaments*" are not sufficiently comprehensive to carry this sum; as it has not been laid out in land. There is no case, where such an interest as this was disposed of by those words.

Mr. *Lloyd*, for Defendant *Master* trustee of the fund, and executor of Lady *Coventry*, tenant for life of it, claimed the interest to her death.

Lord CHANCELLOR.

Master is entitled to the interest to her death without doubt; but if parties will agree to a fund being laid out in a particular manner, they must take it according to the state of the fund. There is no difficulty in the case. As to the first point, I have always thought, the Court has leaned too much against executors; having sometimes insisted, that, after the uses and the personal estate are united in the same person, it shall yet go to the heir, unless there is some instrument, or intention declared, that it should be considered as personal. The only difficulty, I have always had, has been to digest that sort of opinion; as, where the fund and the uses come together, the uses are discharged and merged; there being no person then, who can call to have it applied to the uses; therefore I think, the Court has gone too far. But here the uses and the possession were never together; therefore this is to be considered as land (42). The

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The decisions, that, where the uses to convert personal property into land are united with the fund in the same person, it shall be considered as land, without intent declared to the contrary, have gone too far; for in that case the uses are merged, there being no person to call for the application.

(42) *Pulteney v. Lord Darlington*, 1 Bro. C. C. 223. 7 Bro. P. C. 530. *Hickman v. Bacon*, 4 Bro. C. C. 333. In this work, *Robinson v. Taylor*, ante, 44, and the note in page 45. *Swann v. Fonne-
rean*, *Halliday v. Hudson*, Vol. III, 41, 210. *Wheldale v. Partridge*, V, 388. VIII, 227. *Thornton v. Hawley*, X, 129. *Ware v. Polhill*, XI, 257. *Biddulph v. Biddulph*, XII, 160. *Kirkman v. Miles*, *Tri-
quet v. Thornton*, XIII, 338, 345. *Shard v. Shard*, XIV, 348. *Van v. Barnett*, *Ex parte Phillips*, *Walter v. Maunde*, XIX, 102, 118, 424. *Ashby v. Palmer*, 1 Mer. 296. *Stead v. Newdigate*, 2 Mer. 521. *Langley v. Sneyd*, 1 Sim. & Stu. 45. *Attorney General v. Halford*, 1 Pri. 426. The conclusion from these authorities is, that the right of the representative depends, not, according to

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"All my es-
tates in law
and equity"
in a will pass
personal pro-
perty, to be
laid out in
land.

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Costs to Trus-
tees; but none
for or against
heir at law,
Defendant,
who raised a
point, and fail-
ed. Costs to
Trustees and
executors
brought into
Court, though
they made a
claim, and fail-
ed, if merely
by way of sub-
mission.

heir at law insists upon that; but he also insists, that the tes-
tator has not devised it: but this is so much beyond all proba-
bility, that nothing material can be said upon it. In the wills
in the cases cited you have the word "*elsewhere*." In this
will you have the words "*whatsoever*" and "*wheresoever*;"
there is no doubt, if he had said "*all my estates in law and*
"*equity*" it would have passed this; but the words "*all my*
"*estates whatsoever and wheresoever*" seem to be very equi-
*valent. He sets out with expressing his intention as anxiously
as possible to dispose of all his estates. In disposing of the
real estate he has not only described all, and not only not con-
fined it so as to afford any countenance of argument, that he
did mean some estates having a local situation, but he has
added these words "*all hereditaments whatsoever and where-*
"*soever*." The question then is, is this any hereditament
whatsoever? The heir at law claims it as an hereditament;
answering that himself by allowing, that it is an hereditament;
and therefore, being given by that description, it will pass.
Nobody doubts, the word "*estates*" would pass his interest
in this (43), being an interest, that corresponds with that
description; and the word "*hereditament*" will also pass it.
Nothing is required, except that it should be descendible.
The Master must take an account of the dividends and profits
to the death of Lady *Coventry*, which together with the stock
purchased with her 18*l.* must be paid to her executor *Master*.
Those accrued since belong to the Plaintiff; and a transfer
must be made to him. The trustees must have their costs;
but no costs either for or against the heir at law (44).

Lord *Rosslyn's* opinion in *Walker*
v. *Denne*, post, Vol. II, 170, upon
the actual state of the property,
when it devolves upon him, but
upon the character, impressed
upon it by the instrument; which
character remains, unless the
possession was united with the
absolute title under the uses of
the instrument in a proprietor,
competent to elect, under whom
both representatives claim; or,

if standing out in a third person,
such *cestui que trust* has by de-
claration or some act indicated
his intention to keep it, as it is;
for which purpose a very slight
act is sufficient.

(43) 2 *Ves.* 614. The whole fee
passed by the word "*Estate*"
where nothing to restrain it.
Baylis v. Gale, 2 *Ves.* 48, 4th ed.
where the cases are collected.

(44) An heir at law, made Do-
fendant

Mr. *Hardinge*, for the claimants of the personal estate, being mere trustees and executors brought into Court, asked for costs.

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MASTER.

This was resisted; as by their answer they had claimed this as personalty.

Mr. *Hardinge* said, it was merely a submission of the point to the opinion of the Court.

Lord CHANCELLOR.

If it was a mere submission, they must have costs.

fendant to a bill, to prove a will shall have costs; though he insists upon his title, refuses to release, and cross-examines: otherwise, if he examines witnesses of his own. There must be a strong case to induce the Court to give costs against him. See *Beames on Costs*, 94, 5, 146, 7. *Biddulph v. Biddulph*, 2 *P. Will.* 285. 3 *P. Will.* 374. *Webb v. Claverden*, 2 *Atk.* 424. *Berney v. Eyre*, 3 *Atk.* 287. *Wheldale v. Partridge*, post, Vol. V, 388. Costs of Plaintiff, whose bill was dismissed, applied for out of the estate, on account of the difficulty and novelty of the case, refused: *Wykham v. Wykham*, Vol. XVIII, 395: but see *Cranch v. Brisset*, mentioned, V, 398. as an instance, where, as a bill was necessarily to be filed by some person, Sir *Thomas Sewell*, though obliged to dismiss it, gave the costs out of the fund. See *Lewis v. Loxham*, 3 *Mer.* 429, and the note in p. 430. *Beames on Costs*, 231. No costs to relator, the information being dismissed. *Attorney General v. Oglander*, post, 246.

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July 9th.

3 *Bro. C. C.* 112.

2 *Cox*, 260.

LORD ABINGDON v. BUTLER.

LORD *Abingdon* was tenant for life with power to grant leases for years determinable upon lives. *Godfrey*, lessee for the lives of his son and *Thomas* and *Jane Egerton*, assigned to Renewal of a lease obtained by collusion between lessee and steward of

lessor for an inadequate consideration: bill to set it aside on refunding the money paid: after answer submitting to that on receiving the money with interest, Plaintiff by amended bill prayed either, as before, or that Defendant should keep the lease, and pay the full fine; which on account of the fraud was decreed with interest at 4 per cent. on the residue from signing the lease, and costs; but credit to be given for the money originally paid with interest: and, failing the lessee, the steward to pay.


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 Lord  
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 v.  
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to *Butler*. Two of the lives, viz. *Godfrey's* son and *Thomas Egerton*, having dropped, *Butler* applied to *Benson*, Lord *Abingdon's* steward, for the purpose of putting in new lives; and an agreement took place between them, in consequence of which the old lease was surrendered, and Lord *Abingdon*, 19th of *October*, 1785, being ignorant of the death of *Thomas Egerton*, executed a new lease to *Butler* for 99 years, if his three sons should so long live, under an idea, that he was only adding one life, and changing two; and received a fine accordingly, viz. 200*l.* as for that. The bill was brought by Lord *Abingdon* praying that the lease executed might be set aside as fraudulent upon his repaying the 200*l.* The bill charged this transaction to have been a fraud between the Defendants; that Plaintiff executed the lease relying upon *Benson*; and had a right to call upon him. Defendants denied fraud. *Benson* swore, he did not know of the death of *Thomas Egerton* till 1788; and *Butler* swore, he did not know it at the time of the agreement; but admitted, that he did, when he called on Lord *Abingdon* in town on the 22d of *October*, 1785, and pressed him to execute the lease immediately, not knowing that it had been executed; and that he then stated it to be an exchange of two lives, and an addition of one; but in fact *Egerton* had been dead six months before the agreement between the Defendants, and they lived one within ten, the other within four, miles of his residence; and he was the clergyman of the parish. *Benson* had a valuation book, by which he was directed to take one year's purchase (45) for changing two lives, and 600*l.* for adding two lives; which book, he admitted, was his general guide in letting leases. His receipt to *Butler* expressed it to be for a fine for changing one life, and adding two, but in the account given in to *Eastwicke*, Lord *Abingdon's* auditor, it was only expressed to be for adding one, and changing two. Three different applications had been \*made to *Butler* to deliver up the new lease upon being paid the 200*l.* or to pay the fair fine; both of which he refused to do, till he put in his answer, by which he offered to deliver it up, and betake himself to the old lease, upon receiving the 200*l.* with interest. After answer the bill was amended by inserting a prayer in the alternative, either as before,

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(45) The yearly value was rather more than 100*l.*

before, for delivering up the lease, or that Defendant should pay him the remainder of the fine charged to be 616*l.* or what sum the Court should think fit, over and above the 200*l.* paid before.

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 v.  
 BUTLER.

*Attorney General* and Mr. *Hardinge*, for Plaintiff.

This lease was obtained by fraud, and ought to be cancelled with costs. It was agreed between the Defendants, that the fine should be assessed, as if *Egerton* was living, and that no notice of his death should be taken to Lord *Abingdon*, who executed it relying upon *Benson*. *Egerton* must have been easily missed, especially as they both lived so near him. *Butler* must now stick to the lease, which he three times refused to deliver up. The only pretence he makes for his deceit upon Lord *Abingdon*, when he called upon him in town, is, that he was apprehensive, *Egerton's* death would put an end to the agreement; and, if that should be set aside, he was afraid, he should be a simple-contract creditor, and should be put to great difficulty to recover his 200*l.* After those refusals he cannot now be allowed to set up the old lease, and deliver up this. *Benson* states 36*l.* to be a sufficient compensation for the exchange of a life, which is not according to the valuation book, nor the usual form. He told Lord *Abingdon*, he was only adding one life, and charged himself with that in the account given in to the auditor, though the receipt was given as for two. We may presume from the manner, in which it is stated, that the fraud originated before the execution of the lease; but I will put it the other way; admitting for argument sake, that it was previously executed. Even if after the execution of a lease, but before the party to be benefited by it takes it into his hands, for the purpose of receiving that benefit, he conceals a fact, he knew, and which, if known by the other party, would have caused different terms, that is a lease obtained by fraud.

*Solicitor General*, for Defendant *Butler*.

*Butler* confesses, this lease was improperly obtained, and accounts for the deceit by that apprehension, he has stated. He is a mere country farmer, and *Eastwicke's* offer might have been in his estimation very different from the actual tender of the

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the money. But he is entitled to the offer, considering Lord *Abingdon's* conduct since; he made that offer by his bill, which was accepted by the answer; and he cannot after answer alter the nature of his suit, and insist upon better terms. It was not competent to him to pray the alternate relief by an amendment to his bill. Up to the answer Defendant *Butler* admits costs, from that he ought to have costs. There is no case, where this Court has obliged a man to abide by one contract, where he has made another.

Mr. *Abbot*, for Defendant *Benson*.

It was only an omission in *Benson*, not a misrepresentation. The receipt corresponded with a book called the contract book, which he handed over to *Eastwicke* at the same time with the account; and *Eastwicke* might have informed himself of the truth by looking into that.

For Plaintiff.

Eastwicke says, that was a mere memorandum book, and that he thought, he had no occasion to look at it, but was to go by the account delivered in. The fair equity is to refer it to the Master, to see what he ought to pay in addition to the 200*l.* and that *Butler* shall not be allowed to set up the old lease, and deliver up this.

Lord CHANCELLOR, after looking at the contract book and the other evidence.

Fraud in obtaining delivery of a lease, the execution of which was obtained *bonâ fide*, affects it equally, as if used to obtain the execution; delivery making it a lease.

As you have given no evidence of the valuation, the utmost, you can ask, is a reference. Though I had some doubt about the original fraud, I think, it is well made out by the Counsel for the Plaintiff; for with regard to that the acceptance of the lease is the same thing as obtaining it to be signed. The Defendant knew, it was fraudulent, before the lease delivered, and that it was not in pursuance of what was done before. If Plaintiff has not proved actual knowledge, before the bargain was made, and the lease actually executed, and supposing that an accident, of which I am not sure, but rather think the contrary, delivery makes it a lease, and before delivery he clearly knew it, and pressed therefore for an immediate execution,

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cution, which, he thought, was the thing wanted; and, being assured of the execution, he went to get it delivered, knowing it was not a thing, he had a right to. Then he has so got this estate, and possession of it. Supposing it an estate *de novo*, and the old lease was surrendered, the question is, whether Plaintiff shall not be repaired in the article, in which he was defrauded; whether a party obtaining this estate by cheating in the article of the price shall have an option to chuse, whether he shall give the real value, or not. I think, if by misrepresenting the value, or by any other fraud in the article relating to the price, he had got possession of a new estate, he has no title to come and say, "I have got this estate by fraud for 500*l*. when I ought to have paid 1000*l*. for it." The point, in which the Plaintiff was cheated, is the point, to which the relief ought to prevail. I remember a case from *Ireland*, though I cannot give you the name of it, where the *Solicitor General* persuaded me, right or wrong, to come to that determination. There the parties could not be put back into the same situation. The difficulty occurring to me here is, that, as the possession has remained in *statu quo*, Plaintiff may make a new lease like the old one. But I must do something in reference to the fraud; therefore Plaintiff has a right to insist upon the Defendant's holding the lease, he has given; but the lessee must pay that price, which, if he had not cheated, would have been due to the lessor. I do not consider that as an offer in the original bill. He prayed a certain species of relief, offering to give up the 200*l*. at the same time; and the question is, whether under the circumstances he is entitled to consider the point of fraud, consisting in the *quantum* of the consideration. I think, he has that right; and that is the justice of the case; and the true equity is an inquiry into the value beyond the 200*l*. and to pay that sum with interest at *four per cent*. since signing the lease, and the costs of the cause. My doubt is, if they had made an offer upon their part to do any thing to obtain such relief, whether they ought to be bound by their offer. The circumstance of its being immediately accepted does weigh to a certain degree. But Plaintiff, being advised that he had a more extensive right, amended his bill; he must pay costs for that.

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Bill amended  
after answer;  
costs must be  
paid for that;  
then it is con-  
sidered as an  
original bill;  
Plaintiff is not  
bound by of-  
fers in the ori-  
ginal bill, nor  
Defendant by  
submissions in  
his answer.

Then the amended bill is considered as the original bill (46); and if he is entitled to the relief upon the bill, as it now stands, the rest is perfectly right. The Defendant \* gets rid of the submissions in the answer, which do not bind him after the amendment of the bill. Plaintiff cannot drive Defendant by reading the answer to accept that original offer, supposing he finds it for his advantage to insist upon it: neither party can bind the other. Therefore it ought not to prejudice them. I give interest only upon the residue; therefore Defendant will have credit for the 200*l.* and interest.

As to *Benson*; I am so far from dismissing the bill against him, that he shall pay, if the other does not. He is a party to the fraud. He gave the receipt one way, namely as for adding two lives, and made a representation to his constituent, that it was only for adding one. The accounts were not settled upon the contract book, but were signed by the parties upon the face of the account delivered into the auditor. The other was only a memorandum, of what was done. The decree must be against both. *Butler* must pay, as I have directed; and failing him, the other.

(46) But new subpoenas are not necessary. *Angerstein v. Clarke*, post, 250.

1790.

July 12th.


Purchaser not  
entitled to a  
conveyance of  
part, though  
answering the  
general de-  
scription in the  
advertisement  
of sale, as it  
was not in the  
contemplation  
of either party

CALVERLEY v. WILLIAMS.

WILLIAMS v. CALVERLEY.

THE original bill was by *Calverley* to have a conveyance made to him by the Defendant *Williams* of seven acres of copyhold land called *Cuddington* or *Beaumont's Pits*, part of an estate sold by auction, and purchased by Plaintiff, as being comprehended in the printed advertisement of the sale; which mentioned, and divided into two lots, the lands in the possession of *Groombridge*, at a rent of 65*l.* a year, with a clause of surrender at any time on being paid the reasonable value; and these seven acres were actually part of the lands in his pos- session at the time of the purchase or conveyance; purchaser being referred to a more particular description, which did not include that part; and the surrender having been made according to that and from his own instructions.

session at that rent. Defendant resisted this claim upon the ground, that he did not intend to include these seven acres, or know, that they were part of the lands in the possession of *Groombridge*; that they were not included in a schedule, which he called a *terrier*; and that Plaintiff himself had not included them in the surrender. *Calverley* having got into possession, the cross bill was to be let into possession.

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 v.  
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*Lord* CHANCELLOR.

The original bill is brought to compel the Defendant to convey by way of surrender seven acres of land, as having been purchased at an auction *June 15th*, 1786. No doubt, if one party thought, he had purchased *bond fide*, and the other party thought, he had not sold, that is a ground to set aside the contract, that neither party may be damaged; as it is impossible to say, one shall be forced to give that price for part only, which he intended to give for the whole, or that the other shall be obliged to sell the whole, for what he intended to be the price of part only. Upon the other hand, if both understood, the whole was to be conveyed, it must be conveyed. But again, if neither understood so, if the buyer did not imagine, he was buying, any more than the seller imagined, he was selling, this part, then this pretence to have the whole conveyed is as contrary to good faith upon his side, as the refusal to sell would be in the other case. The question is, does it appear to have been the common purpose of both to have conveyed this part. Upon the 15th of *June*, 1786, when this contract was made, *Williams* had published a printed advertisement, in which he had divided the estate in the hands of *Groombridge* the tenant into two lots, and described, as parcel of the first, farm yards, &c. as let to him upon a lease, of which four years remained unexpired at *Michaelmas* 1786; with a clause, by which he was bound to surrender at any time upon being paid a reasonable value. This *prima facie* gave out, that both lots were in the possession of *Groombridge*; also, that he was in possession of them at 65*l.* *per annum* rent; and also, that *Cuddington*, being parcel of the second lot, was parcel of that let to him at that rent; so any man, who had read this, would go upon a notion, that he had only to inquire, what were these lands so let, and

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 If one party thought, he had purchased *bond fide* part of an estate, which the other thought, he had not sold, it is a ground to set aside the contract. If both understood, the whole was to be conveyed, it must; otherwise if neither understood so.



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 Small varia-
 tion in a gene-
 ral description
 of land not
 material.

also, which were to be included in the first lot, and which in the second. The other lot was described as containing sundry pieces of commonable lands, about fifty-nine acres more or less. This would put them upon inquiry, what were those sundry pieces of commonable lands, &c. If the whole of the inquiry and consequent information had been contained within the compass of this paper, and nothing more was added, than an inquiry of *Groombridge*, what was the estate, he rented at that rent, and what part was contained within the first part of the description, and what within the second, to distinguish them, the circumstance of one part being in *Cuddington*, and one part in *E*——— would have had very little weight; for it is usual to describe, * according to what contains the principal part (47). It must have been imputed to the owner, that he knew the parcels, which were let to *Groombridge*; for whether he did or not, he undertook to know by undertaking to give a description. Therefore if the whole was upon this paper, I should have thought upon the weight of evidence, that he intended to sell *Cuddington* too. But upon this it was evident, that it was necessary to go beyond the paper, to particularize the parcels intended to be included. Nobody would set about purchasing land so generally described, without finding out a more particular description. This was done; for the *terrier*, or what was called the *terrier*, was put into the hands of *Kitchen*, who lived there, in which the parcels of land were drawn out according to their descriptions as in the possession of *Groombridge*. Plaintiff went to *Kitchen*, who furnished him with this, that he might get this estate shewn to him, telling him that he could not value the *terrier*, but that he must apply to *Groombridge* for that. He did so; and *Groombridge* described all in the *terrier*, and he also pointed out to him *Cuddington*, as part of the estate he had. The purchase took place upon the 15th of *June*, and then the question is, what part he intended to purchase, and what part the other intended to sell. In possession of the *terrier*, and having compared it with all the information he could get, Plaintiff went to the steward to settle, how the lands were to be described in the surrender; and settled it accordingly.

After

(47) *Calcraft v. Roebuck*, post, 221. See the notes in p. 226. Vol. V. 734, 849. *Clowes v. Higginson*, 1 *Ves. & Bea.* 524.

After that, and having been shewn all the information he could learn, the steward told him, it was fit to examine the lands more particularly, and to obtain accurate information, that the estate might be surrendered in the duest manner; he did so; and brought descriptions of the lands, he meant; and the surrender was made from the personal instructions of *Calverley*, and he got surrendered all contained in the *terrier*, that was applicable to the second lot, according to his own directions, and without the interference of any one else; so he himself proceeded upon a notion, that he ought to take all, except those seven acres, and that he had included all, except that part, in the surrender. He then finds out, that the seven acres, being part of that, which was let to *Groombridge* at that rent, did so come into the description of one or other of the lots, so proposed to be sold. Accordingly in *August* he applied to *Williams* to have that conveyed. The conversation is particularly stated; "did you not intend to sell all in the possession of *Groombridge*?" and the attorney said, he was bound to sell that also, because in his possession; he said, he first thought, he was: but afterwards found, he was not. The question then is, did he or not upon the advertisement and *terrier* intend to convey this piece of land; for they must be taken together; it is impossible not to consider the *terrier* as part of the advertisement. My opinion is, that he has described all, that he meant to convey, with a particularity giving proof that this was not in his contemplation. It is said for Defendant, that he did not know, there was this part, parcel of what was let to *Groombridge*; and there is nothing unnatural in that; for people possessed of considerable estates cannot know every parcel of land. But I think upon the other side, any person, however unconsant with the actual situation of his estate, that will give a description, must be bound by that, whether conusant of it or not. And he has described it sufficiently to exclude this parcel, and fix the rest; and consequently the other, having it surrendered with that view with the schedule in his hand, must be understood to have bought it according to the schedule, not according to what was in the possession of *Groombridge*. It did not appear, whether all *Groombridge's* land was under this same rent of 65*l.* a year; there might have been an ulterior rent for *Cuddington*, and *Groombridge* never did

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Any person undertaking to describe bound by the description, whether conusant or not.

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 CALVERLEY  
 v.  
 WILLIAMS.  
 WILLIAMS  
 v.  
 CALVERLEY.  
 Costs refused.  
 Cross bill, be-  
 ing for a mere  
 legal title, dis-  
 missed with  
 costs, though  
 the original  
 bill was dis-  
 missed.

did explain that to the buyer; therefore no information was given to lead him to think, that *Cuddington* was parcel of the land, for which the 65 $\frac{1}{2}$  a year was, though it turns out so. The advertisement was awkward (48); but upon the whole I am extremely well satisfied, that the understanding of these parties applied to the lands specifically described; and that Defendant did not mean to convey, nor the other to buy, this. Consequently he has no title to the conveyance, and the bill must be dismissed, but without costs. As to the cross bill to be let into possession, I cannot decree that; it is merely a legal title, and the object of an ejectment; therefore it must be dismissed with costs (49).

(48) Auctioneer at the sale (49) 1 *Sch. & Lef.* 206. *Beames*  
 cannot contradict the written on *Costs*, 66, 166, 172, 174, 5;  
 conditions, such verbal declara- and in note p. 42, for "2" read  
 tions being inadmissible. 1 *Hen.* "1" *Ves. jun.*  
*Blackst.* 289.

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July 12th.

Apothecary  
 agreed to give  
 his patient fifty  
 guineas to re-  
 ceive five hun-  
 dred or an an-  
 nuity of one  
 hundred, if he  
 should survive  
 a year, which  
 he did: bill  
 against execu-  
 tors dismissed,  
 as Plaintiff  
 could not suc-  
 ceed at law;  
 but without  
 costs, on ac-  
 count of the  
 money actually advanced, which must have been repaid upon a bill to set  
 aside the agreement.

### PRIESTLY v. WILKINSON.

**B**ILL against the executors of *Robert Dennison*, praying to have an annuity of 100 guineas secured to Plaintiff out of the assets of *Dennison*, or to have the sum of 500 guineas paid to him. It stated, that the Plaintiff was *Dennison's* apothecary; and that *Dennison* being very low spirited, and fancying himself to be in a very bad state of health, told the Plaintiff during one of his visits, that he was sure, Plaintiff would not insure his life for a year; upon which an agreement took place between them, by which the Plaintiff was to pay *Dennison* 10 guineas then, to receive 100, if *Dennison* should be alive upon the 1st of *January*, 1784, and Plaintiff gave him a promisory note accordingly. *Dennison* offered to enlarge the agreement to 50 guineas, to receive 500, upon the same terms; which was agreed to; and it was farther agreed, that, in case Plaintiff should become entitled to the 500 guineas, he would take an annuity of 100 guineas instead. Plaintiff offered evidence to prove, that the

the consideration of 50 guineas had been paid in this way, viz. the promisory note for 10 guineas, about 30 due to him for medicines, &c. and 10 guineas paid, and, that *Dennison* had said, he had received 50 guineas from Plaintiff. The executors, who proved the will, admitted assets; and offered to pay the bill for medicines; but denied any knowledge of this agreement; and offered evidence, that *Dennison* had said, he had been entrapped into taking 10 guineas, but that he had returned them.

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WILKINSON.

*Lord* CHANCELLOR (without hearing the evidence).

It is impossible for me to entertain such a bill as this. He could do nothing upon it at law. If he goes to law, he will lose the whole. But I think, the money actually advanced ought to be paid back; it is hard and inequitable to refuse that; for, if the bill had been to set this agreement aside, the money actually advanced must have been repaid. But that is the utmost I can do; for this is not a bargain a man should gain by. Let the bill be dismissed without costs (50).

(50) See *Rich v. Sydenham*, 1 Ch. Ca. 202.

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1790.

July 13th.

3 Bro. C. C. 117.

2 Cox, 253.

CROWE v. BALLARD.

**L**ORD *Litchfield* by his will, dated 1774, gave to *Robert Crowe* a legacy of 1000*l.* payable at the death of Lady *Litchfield*; and died in 1776; Lady *Litchfield* being then sixty-nine years of age. Two or three months after his death *Ballard* was applied to by Doctor *Sealy*, *Crowe's* tutor, and soon afterwards by *Crowe* himself, then in *France*, to raise money for him by the sale of this legacy; which *Ballard* undertook to do; and soon afterwards represented, that he could not get any person to give more for it than 350*l.* to which terms *Crowe*, being in great distress, agreed; and accordingly executed an assignment of the legacy to *Toft* in *September*, 1777, and according to the answer 310*l.* was actually advanced by the Defendant (though he represented *Toft* as the purchaser) in different obligor was bound by the former transaction: all the deeds set aside, and account decreed.

Purchase and re-purchase of a legacy expectant on a death: the whole transaction set aside for fraud, and not confirmed by a subsequent bond and payment of interest for four years, being given under an idea, that

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 CROWE
 v.
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different payments by small sums, some to *Crowe's* order, some to those of his brother, and some to Doctor *Sealy*, all between *October*, 1777, and *March*, 1778. Out of this sum 49*l.* was disputed; the Defendant representing it to have been paid to *Sealy*; which was denied. In 1780, when Lady *Litchfield* was seventy-two, and was considered as dying, *Crowe* applied to *Ballard* for the purpose of re-purchasing this legacy, and then found, that he was the real purchaser, and that *Toft* was only his trustee. *Ballard* agreed to this proposal upon condition, that *Crowe* and his brother would enter into a *post obit* bond to pay him the sum of 1800*l.* three months after the death of their father, then aged sixty-three. They consented; and such bond was accordingly given; reciting, that it was in consideration of a debt of 900*l.* Soon after the death of the father in 1782 a new bond for that sum with 5 *per cent.* interest was entered into by them upon the application of *Ballard*. This bond was really executed in 1783, but was antedated. In 1787 *Crowe* and his brother offered to pay *Ballard* the money originally due with interest; which he refused; and brought an action on the bond; upon which in *May*, 1778, the bill was filed; praying, that an account might be taken between Plaintiff and Defendant of money paid by the latter to *Robert Crowe* or to his order, and that upon payment of the money appearing to be due, the Defendant might be decreed to deliver * up the bond; and for an injunction to restrain him suing on the bond.

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Solicitor General, Mr. *Lloyd*, and Mr. *King*, for Plaintiff.


If it remained upon the first part of the case, upon the authorities the original transaction could not have stood. Every thing occurred here, which occurred in those cases, in which transactions of this nature have been set aside. *Crowe* was a young heir in the power of his father, and was in such necessity, as to be obliged to beg *Ballard* to advance 10 guineas to him; which was the first sum advanced. The bond fails in its recital of the debt of 900*l.* which was only a colour. It is a sale by a young heir during the life of his ancestor; and there is no authority, where such a transaction has stood (51). If it rested upon that alone, it ought to be set aside. The only argument,

argument, that can be urged, is, that the last bond in 1782, and payment of interest for four years, are a confirmation of the original transaction. This Court has decided, that such transactions have stood upon a confirmation; but there is no case for that, where the party was in the power of the man, to whom he makes it, and was in distress at the time. *Lord Chesterfield v. Jansen* (52) is the leading case upon the subject; where it is said, that if the distress is continued, it is only double hatching the original fraud, and a continuation of it; and it appears here, that at the time of giving this second bond the Plaintiff was in the same distress, as when the first was given. There was no sufficient time allowed to inform himself of the particulars of the transaction. Defendant admits, that in a decent time after the father's death he wrote to him to come to town. The bond bears date the very day after the father's death in 1782; but it was antedated; for it was not executed till one or two months afterwards, in 1783; and the first application came from the Defendant; who admits, that upon hearing of the father's death he sent to the Plaintiff to come to town; and, if he had refused, he was totally in the other's power. In *Chesterfield v. Jansen* Mr. *Spencer*, being thirty years old, a man of great fortune, who made the first application, there being none from the Bankers to him, and who was out of their power, and the lady, from whom he had the fortune, being dead, and he being perfectly well *acquainted with all the circumstance,s and the probability of his being relieved by an application to this Court, under all these circumstances confirmed the transaction. *Cole v. Gibbons*, 3*P. Will.* 290, was also a case of strong confirmation. *Curwyn v. Milner*, 19th June, 1731, 3*P. Will.* 293, note, mentioned in *Chesterfield v. Jansen*: an heir borrowed 500*l.* and was relieved even after payment of the money, because afraid of an execution. *Crowe* to the last was not informed, that the 49*l.* charged in *Ballard's* account as part of the transaction, was not paid; there is no evidence by *Ballard* of these payments having been made; and, if that was not paid, it was a fraud upon *Crowe*. In the letter of the 9th of *February*, 1788, *Ballard* states, that at that time he had overpaid any demand, *Crowe* had

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(52) 1 *Atk.* 301. 2 *Ves.* 125. See *Morse v. Royal*, post, Vol. XII, 355.

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had upon him; which, compared with this *item*, shews, it never was paid; for this *item* is after that letter; in the next month he put it down to make up the sum. In the late case of *Norris v. Ross*, 1779, *Norris*, heir of Admiral *Norris*, being in distress, in 1768, in order to raise 2000*l.* granted an annuity of 435*l.* to commence upon the death of the father; who died the same year; after he came into possession of the estate, being pressed to pay this, and being then in affluent circumstances, he mortgaged for the market price of the annuity granted. He submitted to it to 1775; and then brought his bill; and the Court relieved him notwithstanding the mortgage, and that he had rested upon it so long; and set aside the mortgage upon payment of the 2000*l.* and there it was not so unconscientious a bargain as this. The confirmation therefore is not in a better condition than the original transaction.

Mr. *Mansfield* and Mr. *Scafe*, for the Defendant.

It is not now a question, what would be the proper justice between the parties, if it had stood upon the original transaction without any thing intervening to alter or confirm it. As to the price of this, according to the calculation of the actuary of an insurance office it was calculated with compound interest, as they always do; but no witness offers to say, he would have given more than 350*l.* for it. The case then is, that in 1777 *Robert Crowe* by means of his tutor employs *Ballard* to raise money for him by the sale of this legacy, which was completed for 350*l.* In 1780, when Lady *Litchfield* was understood to be dying, and when consequently it was worth very near its full value, he desired to redeem it; the treaty for the redemption was upon * the ground of a bond for money not absolutely after the death of the father (though the calculation of the price is, as if it was so) but in case either son should survive him. This ought to be taken into the valuation; which should not be of so much money to be paid in all events, but subject to the contingency of both sons dying before the father. Besides it was calculated, not upon the idea of Lady *Litchfield's* having been in 1780 very near her death, which happened soon afterwards; but upon her age of seventy-two as a good life. The last deed in *October*, 1782, (it does not appear how soon after the father's death) is not pretended to have

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have been prepared by the Defendant. *Robert Crowe* was then twenty-seven years of age. The debt of 900*l.* is of no consequence as to the present dispute ; as, if the payment was to be postponed, he might take an additional sum for interest ; but if not, it is only a reason, why less should be paid, but no ground for the relief prayed. *Crowe* represented himself to be indefeasibly entitled after the death of his father to an estate of 3000*l.* a year. Then at the age of twenty-seven, without any threat, difficulty, or embarrassment, but because it was more convenient to him to postpone payment, he gave this bond ; paid interest upon it for four years ; and did not quarrel with it for five years afterwards. If this is not good, no period can be fixed to transactions of this kind. The cases do not apply. In *Chesterfield v. Jansen* after confirmation all right to impeach the transaction was held to be gone. *Curwyn v. Milner* was the case of a man either in execution, or under immediate dread of it. In *Norris v. Ross* it was understood, that during the whole time the person was dealing with him, who had got security, he was in extreme distress. There is no proof of imposition upon *Crowe* as to the payment of any part of this money. It is sworn by *Ballard*, that he paid this sum short of the 49*l.* in the manner stated in the answer, and that that sum was paid at several times to *Sealy* ; who only swears, he does not remember receiving that, and that he thinks he should, if he had received it. The other swears positively. *Ballard* has sworn, that he applied to two persons who would neither of them procure the money ; and he was restrained from putting it up publicly by *Crowe* ; who desired, it might be as private as possible, least his father should hear of it. *Crowe* has received the legacy, and this 350*l.* with interest from 1777 to 1782 ; which makes the consideration. The application to *Ballard* was to raise the money either upon this legacy, or the estate he should have from * his father. He told *Toft*, when he offered it to him, that he was awkwardly situated about it ; as *Crowe* was in want of the money to return to *France* immediately ; and depended upon it ; and therefore he apprehended, if he could not get any one to advance it, he must let him have it himself, and if so, some dispute might arise, if he did not give as much, as it might be worth in *Crowe*'s estimation ; upon which *Toft* advised him to purchase

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purchase it himself by way of a trust; and offered his name for that purpose. *Crowe*, when he wanted to repurchase it, offered the *post obit* bond for 2000*l.* which Defendant thought too much, and refused.

*Lord CHANCELLOR.*

The case lies in a very narrow compass. A young man, under a tutor, paid by his father 100*l.* a year, and himself allowed 200*l.* a year by his father, falls into distress; and applies to *Ballard* to raise money. The only fund, he could propose for that purpose, was this legacy, payable at the death of *Lady Litchfield*, then 69. He applies to *Ballard* to get this disposed of; who undertakes to sell for him; and now pretends, he took pains for that purpose. In his answer, which is better drawn than his depositions, he lets that fall in general expressions; but by the evidence it appears, that he represented it to *Browne*, whom he employed to find a purchaser, as a very hazardous adventure. *Browne* then goes round with these instructions; and all, he gets from those, he applies to, is, that it is very hazardous, and they will not engage in it. Under that notion of hazard all the persons, he applies to, refuse to take any share in it; and then he buys it himself. If this Court does not keep up the tenor of its rule of protection in these cases, the consequence of going half way is only making them pay for cheating it. Here he bought it at a price so outrageously low, that it deserves no other name than that of a rank fraud (53). You cannot talk of the computation being that of compound interest; it must be so, and that is the rate, at which it would be sold, if sold fairly; and the difference of the price of its real value and that given is the difference, which the danger of its being set aside in a Court of Justice imposes. For the same reason he did not mention, that he had himself bought it. As to the money he did advance, I do not know what to say to it, whether he did advance it or not, or whether by the order of *Crowe* or not. The whole is but 310*l.* including the 49*l.* the payment of which is denied by *Sealy*; consequently there is 40*l.* of it, which

(53) Post, Vol. VIII, 137, 292. *Whalley v. Whalley*, 1 Mer. and the note. *Underhill v. Hor-* 436. *Oliver v. Court*, 8 Price, wood, *Mortlock v. Buller*, X, 200, 127.




which he never pretended to have advanced, and 49l. the payment of which is contradicted; and the manner, in which he advanced it, renders it as griping and as pressing a transaction as possible. Then, while the father was alive, he got the two sons into a *post obit* bond, of which the whole consideration is that, I have mentioned. Then as to the confirmation; I have attended formerly to the reason of that word "*confirmation*;" and have been at a loss for the principle, upon which the Courts have spoken of such transactions as these, subsequent to the demand arising, as a confirmation. I know, if a gentleman of honour and fortune feels himself bound in honour by the circumstances of a bargain, however disadvantageous, not to rescind it, and, knowing the case, declares, when of full age, not under the terror of distress, that he thinks proper to give a new bond; the circumstance of an honorary engagement, attended with money actually advanced, is sufficient to maintain the possessor of the new bond. But if a man gives a new bond under an idea, that the old one may be enforced against him, at what time is that a confirmation? If he was poor, or distressed, or under an influence of terror, it was not a confirmation; why not? Because he was not in a situation to be master of himself. If he does not appear to have been delivered from that specific apprehension, he was still acting under the influence of that supposition, which has no existence in fact, and which only drives him to *double-hatch* the fraud, a quaint expression, which I do not go upon. What I go upon is, that the second bond was not given freely, but upon a consideration, that in his mind carried with it a value, it ought not, and was derived from a fraudulent consideration. The case mentioned by Mr. King, the circumstances of which I do not pretend to recollect well, might have gone upon an argument like this. *Norris* was tenant in tail; and was for a long time in affluent circumstances; and ruined himself long subsequent to this; and therefore there was no impression to induce him to pay the interest, but that he had got himself into a situation, from which he did not know how to relieve himself. Therefore all these deeds must be set aside; and an account taken; and what appears due upon the account to the Plaintiff must be paid to the Plaintiff; and what to the Defendant, must be paid

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Bond given at full age, and not in distress, but under a notion of honor, will, if attended with money actually advanced, maintain a former bargain, however disadvantageous; but is no confirmation, wherever it is not given freely; as if under distress or terror or apprehension from the original transaction, though unfounded.



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paid to the Defendant; and the Defendant must pay the costs.

It was stated at the bar, that the money due on the bond was in Court.

*Lord* CHANCELLOR.

Costs given; and the fund, being in Court, ordered to remain, till the account; the costs to come out of the balance, if any, due to the party, as far as it would go.

Let it stay in Court therefore, till the account is taken; and if there is any balance coming to the Defendant, deduct the costs from that, as far as it will go, and he must pay the rest besides (54).

(54) Purchase of a reversion not set aside after the event for undervalue, there being no fraud: *Pickett v. Loggon*, *Huguenin v. Baseley*, XIV, 91, 215, 273. *Say v. Barwick*, 1 Ves. & Bea: 195. *Roche v. O'Brien*, 1 Ball & Beat. 330. *Smyth v. Smyth*, 2 Madd. 75. *Griffiths v. Robins*, 3 Madd. 191. *Taylor v. Obee*, 3 Price, 83. *Oliver v. Court*, 8 Price, 127. As to abuse of confidence in various relations, see *Wright v. Proud*, post, XIII, 136, and the note, in page 137. 94. *Purcell v. M'Namara*,

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CALCRAFT v. ROEBUCK.

July 14th.

Agreements for sale of an estate, especially if by auction, depend on the *bond*

**I**N May 1788 *Calcraft* by a printed particular advertised a freehold estate to be sold by auction, consisting of about one hundred and eighty-six acres; forty-five of which were described to be a compact farm, and the rest a park. They were

*fides* of the transaction; therefore trifling errors in the description are not material. Advertisement of an estate for sale by auction described it all as freehold, though a small part was held at will: After execution of articles a treaty for an exchange of that part took place; pending which, at the time appointed for completing the purchase purchaser took possession forcibly; but proceeded in the treaty afterwards, till he finally refused to agree to the purchase: On bill of vendor purchase-money decreed to be paid with 4 *per cent.* from the time it ought; but inquiry directed as to what ought to have been the compensation at that time for the part not freehold, that, with the out-going to be deducted.

were sold accordingly, and articles of agreement signed for 18,000 guineas to the Defendant by *Christie* the auctioneer. After the sale it appeared, that about two acres in or near the centre of the park were not freehold, but leasehold, and, the lease having expired, were at the time of the sale only held from year to year. An exchange was afterwards set on foot of these two acres for two and three quarters belonging to *Bailey*, which *Calcraft* was to procure instead of them. At *Michaelmas* 1788, when the purchase was to have been completed *Roebuck* made a forcible entry; after which event the treaty for the exchange was proceeded in; but afterwards he refused to agree to the purchase, unless a compensation of 1000*l.* was made to him for these two acres, and for a deficiency of five acres, which Plaintiff represented as a marsh, and Defendant as mere mud lying between the river and a place called the *Sea Wall*, and that it was overflowed at spring tides, and frequently at other times. There was evidence on both sides as to this. He made another objection as to four cottages, which he [contended were to be part of the purchase; and he also objected, that the farm could not be called a compact farm, the five acres mentioned before, (and which Plaintiff considered as part of the \* farm) were separated from the rest. An arbitration took place; and, having proceeded as far as minutes of the award, went off; upon which the bill was filed for a specific performance, and interest of the purchase-money, since it ought to have been paid. There was a cross-bill by *Roebuck*.

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*Solicitor General* and Mr. *Lloyd*, for Plaintiff.

There is nothing in the printed particular relating to the cottages; and one witness swears, they were not intended to be comprised in the estate to be sold. They were held under a distinct title; and do not relate to the rest of the estate. The deficiency in quantity, if any, is very small. The farm is really about forty acres; then this is like many cases decided in this Court, where a small difference in quantity is not attended to; and Defendant ought to have seen to the quantity. As to the objection, that, the five acres being separated from the rest, this is not a compact farm, one witness swears, he held the farm with the five acres twenty-two years. As to the two acres of leasehold, the agreement was signed in *May*;  
in

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in *June* an abstract of the title was delivered; and *Williams*, agent for the Plaintiff, says, that after delivery of the abstract Defendant often called upon him relative to the title; and was informed, that the two acres were demised by Sir *Francis Head*. The agreement was confirmed by his subsequent conduct; either it must be taken, that he has submitted to take upon himself to procure the exchange with *Bailey*; or, if it is referred to the Master, it ought to be in a way, that the Master may take into consideration, at what price the freehold, to be taken in exchange, might have been procured, when *Roebuck* took possession of the estate; and, if the price was increased by his default, he ought to have no compensation. From *Bailey's* evidence it appears, Plaintiff might, at the time this agreement was entered into, have purchased the freehold of these premises by a conveyance of some of his own, which, *Bailey* says, it would have been his interest to take, as more valuable to him. Defendant knew that, before he took possession; and, knowing that, took possession forcibly against the will of the Plaintiff; who had the means of negotiating that with effect. Down to the arbitration the Defendant knew that. Then he informed *Bailey*, he was determined to have the effect of this bargain from Plaintiff; and therefore *Bailey* might have any thing from him, he pleased, in order to enable Plaintiff to make that bargain with him. By keeping possession the Defendant *insisted, he had a right to the benefit of this contract; that he had a right to call upon Plaintiff to execute it substantially by conveying to him every thing he could, or by making him a compensation for the rest; then he insists upon keeping the estate, and yet puts it out of Plaintiff's power to give him the property, which he knew, *Bailey* was willing to let Plaintiff have.

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Attorney General, Mr. *Mansfield*, and Mr. *Richards*,
 for the Defendant.

Though there is nothing in the particular applicable to these cottages, yet by the map they appear to be part of the park. They were held out so to the world; and some of them are within the wall. The farm represented was about forty-five acres, with a house and suitable buildings. To make up this they speak of about five acres of marsh land occupied with the farm; but the witnesses for Defendant do not speak of any
 five

five acres, except that quantity of mud. These two acres lying near the centre of the park, and which Plaintiff had no right to convey, might be made very inconvenient to the owner of the park; as buildings might be erected on them for any purpose, the most noisome and offensive; therefore he ought to have these two acres, or a compensation for them. As to his taking possession, he swears, he took it under the authority of *Christie* the auctioneer; but that act, or the manner, in which it was done, cannot alter his claim for deficiency or misrepresentation. It is said, he agreed to give up this claim; but it is sworn only, that he expressed himself satisfied; perhaps he thought, there would be no difficulty in obtaining a grant in fee of this piece of ground in exchange.

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This agreement to waive his claim is not part of the bill; as it ought to be, if they meant to go upon it.

For Defendant.

As to the demand of interest, by his bill the Plaintiff states, that there were many judgments against him, which, he says, were not satisfied till *July*, 1787; and it is now in proof, that there were others not satisfied till *Hilary* Term last. The bill states, that they occasioned some delay in the proceedings, till they were satisfied. Defendant was ready with his purchase-money; and * deposited it in a Bank; then he is in the case of a purchaser, in treaty with a man, who cannot make a good title, and having his money always ready, lying dead; therefore it would be unreasonable, that he should pay interest.

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Lord CHANCELLOR.

Every consideration, upon which these agreements ought to be executed, must depend up the *bond fides* of the transaction⁽⁵⁵⁾; for when the question is upon the selling an estate

(55) As to misrepresentation, *Alliston*, 1 *Mer.* 26. *Viscount* see post, *Cadman v. Horner*, *Clermont v. Tasburgh*, 1 *Jac. & Vol. XVIII*, 10. *Lowdnes v. Walk.* 112. *Edwards v. M'Leay, Lane*, 2 *Cor.* 263. *Wall v. Coop.* 308. 2 *Swanst.* 287. *Stubbs*, 1 *Madd.* 80. *Stewart v.*

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estate upon articles, particularly by auction, it is impossible, that all the little particulars relative to the quantity, title, situation, &c. should be so specifically laid down as not to call for some allowance and consideration, when the bargain comes to be executed; therefore the question is, where the *bond fides* is, what is the extent of it, and the conclusion upon it. In *May* 1788 *Calcraft* in a printed particular put up this estate to sale, describing it all as freehold, and about one hundred and eighty-six acres; then he held out, cautiously or incautiously, but incautiously in this case, where part of it was not freehold, an offer of freehold in the particular situation described; and therefore disappointed a purchaser, if any part turned out to be in the situation of these two acres; for the whole, except forty-five acres, was pleasure ground, and the value of it consequently consisted in the arrangement, &c. It was bought for 18,000 guineas. In *June* 1788 it was understood, that these two acres were not freehold, and not only that, but that they were held only from year to year. Various other objections were made and discussed, and proposed to be relieved, particularly this as to the two acres. It is pretty clear upon the evidence of *Williams*, that at that time the exchange of the two acres for two and three quarters belonging to *Bailey* was looked upon to be so practicable, that *Roebuck* seemed to have had no difficulty of closing with the bargain to take these two and three quarter acres in exchange for the two acres in the park. It is clear, that it is impossible to state what was said upon that subject higher; the conversation, in which he expressed himself satisfied with those terms, and the evidence of this witness, that he was so till very lately. If it was a concluding thing, I do not know, why it was not concluded; for it was struck with the agent, who was a man of business; but, though the terms were understood to be reasonable, it went no farther. When the time for completing the bargain came, viz. *Michaelmas* 1788, an application was made to have possession delivered. For Defendant it is said, *Christie* gave him a right to * take possession; but that is idle, and inconsistent with the application to *Williams* for leave, and with the circumstance of the possession being held from him by *Calcraft*; such right, if given, could stand no longer than till refusal and resistance. At *Michaelmas*

mas Defendant, liking the bargain, took possession; but previously to that *Williams* in a conversation between them told him, it was necessary, that all these things should be settled before the conclusion of the business, and, that it would be imprudent in him to take possession before; as that would be an admission, that he had no objection to any part of the bargain. After receiving that intimation, he took forcible possession. I confess, I have turned it much in my mind, whether there is not a ground arising upon that to say, he had bound himself to make any farther objection about the two acres; and would have been glad to have found a line to do that; but there is not, unless the matter had totally ended there; if it had, then with that notice I should have been inclined to have held him down; but all, that passed subsequent, renders that very difficult, if not impossible; for I cannot infer from his conduct, though he took possession with violence, that he in his own mind did agree to quit his hold upon this demand: nor, that *Calcraft* understood him to do so; for the latter treated with him for a compromise, after he took possession; therefore, if he fixes him with the possession, it is more in the nature of a penalty; which is an impossible ground for this purpose. The treaties for the compromise, subsequent to the taking possession, shew, that at the time of those treaties it was possible for him to have finished the matter, as originally proposed, by the exchange with *Bailey*. *Bailey* had a conversation with *Roebuck*; in which the latter informed him, he might make what he pleased of the land; as *Calcraft* must have it, in order to conclude his bargain with him; and *Bailey's* disposition as to the land had remained subsequent even to the *Michaelmas* the same as before, viz. that he would make a dry exchange (which would, I dare say, be a good one for *Bailey*); except that the situation *Calcraft* was in, from the impossibility of getting his money without a suit, and being held out by an opulent man, might drive him to a sort of distress, of which more might be made, than the real value of the land. Now *Roebuck* says, his money was always ready, since he took possession. If this is true, which perhaps is so, he gave no notice of it to *Calcraft*. He took no measure to arrange this thing; for (upon the evidence of *Montford* I speak) it is impossible to disguise the manner,

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in which that transaction of the arbitration occurred. *Montford* was appointed arbitrator. It is not uncommon for a person, appointed arbitrator, to consider himself as agent for the person appointing him. How that is so common I wonder; as it is against good faith (56). The bond says, he is an indifferent person; and he breaks a most solemn engagement in considering himself otherwise. *Montford* says, the minutes, represented to have been taken down of terms looked upon to be reasonable, were not authorised by him to be taken down as the ground of the award; and that he held no public conversation to that effect; not denying private conversation, nor, that he thought them reasonable, nor, that they covered the whole value of what was in dispute. But he was taken out of the room by the person, who appointed him an arbitrator, and, when he came in again, all this was broke off; and after this conduct they have examined him, expecting, that faith would be given to him; and he now offers to swear, that these houses were part of the thing intended to be conveyed. Subsequent to this other terms were proposed in the same manner; and this man was held off in this way. The good faith of the thing required this; either in *June* 1788 the Defendant should have said, that this ground was so situated, that it made it a very different thing from what he intended to purchase, and therefore he would be entirely off; or he should have proceeded to execute the contract, after adopting that plan upon the other side. Instead of that he takes violent possession; and makes this man *Bailey* think, he is entitled to demand what he pleases; and therefore *Bailey*, who was *nothing loath*, enhances his demand. However notwithstanding all this I am bound down by the rule of the Court to allow some compensation. But in referring this to the Master I shall refer it to him to consider, what under the circumstances ought to be allowed as a deduction from the price in *Michaelmas* 1788, when the money ought to have been paid; and if he thinks, as I do, upon it, he will not allow more, than if it lay in the middle of a waste at the farthest end of the kingdom. He must also compute the value of the outgoings; both of which must be deducted from the purchase money; after that *Roe-*
buck

(56) Post, Vol. II, 453. IX, 68. So as to Commissioners for Partition, XI, 160.

buck must pay the rest, with 4 per cent. from *Michaelmas*, 1788 (57).

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(57) *Calverley v. Williams*, ante, *Grant v. Munt*, *Coop.* 173. 210; post, *Bowles v. Round*, *Wright v. Howard*, 1 *Sim. & Stu.* Vol. V, 508, and the notes, 734, 190. *Turner v. Harvey*, 1 *Jac.* 849. *Drewe v. Hanson*, VI, 675. 169. *Wall v. Stubbs*, *Knatchbull v. Grueber*, 1 *Madd.* 80. 153. 306. *Dyer v. Hargrave*, X, 505. 3 *Mer.* 124. *Stewart v. Alliston*, *M'Queen v. Farquhar*, XI, 467. 1 *Mer.* 26. *Binks v. Lord Rokeby*, *Halsey v. Grant*, *Horniblow v. Shirley*, *Hearne v. Tenant*, *Stapleton v. Scott*, XIII, 73, 81, 287, 425. *Milligan v. Cooke*, *Balmanno v. Lumley*, 1 *Ves. & Seaman v. Vawdry*, XVI, 1, 390. *Bea.* 224. *Lowndes v. Lane*, *Todd v. Gee*, XVII, 273. *Cadman v. Horner*, XVIII, 10. 2 *Cox*, 263.

COUNTESS OF SHREWSBURY v. EARL OF SHREWSBURY.

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July 19th.

THE late Earl of *Shrewsbury*, under a remainder in a settlement made 1718, and an act of parliament 6th *Geo. I.* 1720, for the purpose of enabling the parties, who were *Partists*, to take under the settlement, which was confirmed by the act in every particular, became tenant in tail in possession upon his father's death, subject to a charge of 15,000*l.* for the portions for his sisters, *Mary* afterwards *Lady Dormer*, *Barbara* afterwards *Lady Aston*, and *Lucy Talbot*, under a power in the settlement to charge part of the premises by a term of 99 years to raise that sum from rents and profits, or by sale and mortgage; if only one daughter, to her; if more than one, equally to be divided among them, share and share alike, payable at twenty-one, or marriage, with maintenance at 5 per cent. from the rents and profits. This power was executed by the father about the year 1733 by indenture between him, Lord *Fitzwilliam* and Mr. *Pitt*, conveying to them various not appearing) though the subsequent remainders were exactly of the same nature, and, the term having been very short, little more than forty years remained.

Tenant in tail restrained as to alienation, but with powers of leasing and jointuring as in case of tenant for life, considered as tenant for life, and therefore his personal representative a creditor for a charge on the estate paid by him (intent to the contrary though the

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various premises in trust for 99 years for that purpose. By a clause in the act of parliament it was provided, that no person taking under that settlement (under which all the limitations were in tail) should alien any part of the hereditaments so settled, or do any other act to disinherit any person in remainder, unless he should conform to the established religion, and take the oaths within six months after he should have attained the age of eighteen years; and that all such acts, alienations, fines, recoveries, &c. should be void in respect to those in remainder. Powers of jointure and leasing were given, with restrictions usual upon tenants for life, to all taking under the settlement. In 1742 upon the marriage of *Barbara* with Lord *Aston*, the late *Earl* with his own money paid 5000*l.* being her full share of the sum charged by the settlement; and received from her a release to him and his heirs in respect of it. In 1751 he paid to *Mary* Lady *Dormer* upon her marriage part of her share; and the remainder, and *Lucy Talbot's* share to her, afterwards, at what time did not appear, but supposed to have been, when the latter was of age, in 1753. He never took any assignment of the term: nor was there any declaration of *trust upon his so paying off this charge. In 1751 by deed, reciting, that he was seised of the freehold subject to this charge, and that he had discharged Lady *Aston* in full, and some part of Lady *Dormer's* share, and that, as none of these sums had been raised under the term, he had a right to have them raised for himself; he in consideration of 1000*l.* conveyed to *Robinson* for a term of forty years an advowson, part of the premises comprised in the term; and the trustees consented, and were parties, upon condition that the consideration, viz. 1000*l.* should go in discharge of so much of this sum of 15,000*l.* He died in 1787; leaving a will, dated in 1749; but without taking any notice of his right to be reimbursed this sum, which he had discharged, or doing any other act, by which his intention could be known. The bill was filed by his widow (who was provided for by a jointure) as his administratrix with the will annexed, and sole personal representative, against Lord *Shrewsbury* nephew of the late *Earl*, and tenant in tail, in the same manner restrained as to alienation as the late *Earl* was, and against the trustees of the term, praying that they might be compelled to raise by sale

sale or mortgage, or out of the issues and profits, or otherwise as the Court should direct, such sums (58) as were paid by the late *Earl* to his sisters, or their husbands, in satisfaction of their shares of the sum of 15,000*l*.

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The *Lord Chancellor* decreed (59) for the Plaintiff; and the cause came on again upon the petition of the Defendants for a re-hearing.

Solicitor General, Mr. *Mitford*, and Mr. *Richards*, for the Plaintiff.

The first question is, whether the late *Earl* was, or his representatives since his death are, entitled to have this sum raised. Upon the proviso in the act of parliament your Lordship was induced to think, that the late *Earl*, though tenant in tail, stood as to the point in discussion exactly in the situation of tenant for life. Being so tenant in tail, restrained from alienation, the trustees joined with him in the grant of the term to *Robinson*; but your Lordship observed, that it would have been a fraud upon the inheritance, unless that sum of 1000*l*. the consideration * paid for that, had gone with the inheritance. The decree is right. The rule is, that where the owner of the inheritance pays off an incumbrance, his personal representative shall claim nothing against the heir; as it is the case of the owner of the estate paying off his own debt.* Tenant in tail has been considered in the same way; namely that he paid it off for the benefit of the estate; as he could make himself master of the estate; which raises a presumption, that he meant to pay it off for the benefit of the inheritance; with this difference, that he may give indications of his intention to keep the charge alive; which will place him in the same situation, in which the Court considers tenant for life to stand. But the same inference cannot be presumed for tenant for life; as it would be paying it off for the benefit of other persons. *Kirkham v. Smith*, 1 *Ves.* 258. The argument must be, that it was the intention of tenant for life to pay it off for the benefit of the inheritance; as he could not make the estate his own, as tenant in tail could; for the act

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(58) They only went for the remaining 14,000*l*. after deducting the 1000*l*. paid in 1751.

(59) 3 *Bro. Ch. Ca.* 120.

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act of parliament prevented him from doing so; and gave him powers of jointure and leasing under restrictions usual to tenant for life. It was insisted, that the acceptance of a release upon paying off Lady *Aston* in 1742 shewed an intention to discharge the estate. It was in form a general release to Lord *Shrewsbury*, and likewise a discharge to the trustees in the term; but not otherwise with respect to those, who were to follow Lord *Shrewsbury*; nor did it declare the intention; but only recited, that he paid it off. Your Lordship thought, it followed naturally upon payment of the portion to the person entitled under the settlement. You thought, the deed in 1751 contained strong evidence of an intention to keep alive this charge upon the estate. It appears, that he then considered, that the instrument of 1742 had the operation the Plaintiff contends for; that he had a right to have that sum raised; and he does there provide for raising part of that sum, viz. 1000*l*. If he had a right to call for it, it is incumbent upon those, who resist the claim, to shew, he meant to abandon it. They ought to shew, that by some act he indicated a change of intention, knowing that the term was still a subsisting term; for it was not merged. Another point, stated by the petition, but not made before, is, that, if Lady *Shrewsbury* is entitled to call for this charge, it ought to be apportioned as between the late *Earl's* enjoyment of the estate, and the future enjoyment of it \* during the remainder of the 99 years term. He certainly lived till 1787, till above 50 years of the term had expired. The common rule as to these provisions is, that tenant for life is to bear part of the burthen, namely the interest. This equity must have occurred in every case; but the Court has never acted upon such a principle as that insisted on for Defendant; probably upon account of the difficulty of settling the proportions. The only ground then must be the shortness of the term, which is usually for 500 years; but that cannot alter the rights of the parties; and if 99 years is held to be too short a term, what quantity is necessary?

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Mr. *Mansfield* and Mr. *Graham*, for the Defendant.

The present Lord *Shrewsbury*, nephew to the late *Earl*, is precisely in the same situation; and all the descendants must be

be so, unless they conform, as required by the act of parliament. By those clauses in the act, which are very singular, they are equally owners of the estate; which makes it very different from the common case of tenant for life, with remainder in tail. The charge must be raised upon the present *Earl*, if at all, upon account of the shortness of the term; for, when the late *Earl* died, he left only about forty years of it unexpired. This claim by his representatives is founded upon the supposition, that the late *Earl* is to be considered as tenant for life. He had every power and property belonging to tenant in tail except alienation; he might commit waste, cut down timber, open mines; and his wife was dowable; therefore he was not merely tenant for life. In 1742, when he paid Lady *Aston*, he took no assignment; nor did he call upon the trustees to do any thing to secure him that sum; nor shew any intention to reimburse himself; but he took such an instrument, as was perfectly proper, if he meant to discharge the estate; though I do not say, that the release, though not a proper instrument, would have prevented him from calling upon the trustees in a reasonable time. The release, being to him and his heirs, looks, as if he meant, it should fall into the estate; and he had the same intention as to that, and what was paid to the other sisters. The sole reason of that recital in the deed of 1751 was merely, as it was a particular mode of conveyance, at the instance of the purchaser: or it was inserted by the lawyers; who were acquainted with the rule better than Lord *Shrewsbury* could be; but it cannot be considered as a mark of intention. He was afterwards applied to to grant an additional term in the advowson; \* which he positively refused in 1771; which shews, that he had no intention to burthen the estate; for why did he refuse it, if he intended to pay himself any part of this money? There could be no better way to the successive owners of the estate than by demising this part; of which, being Papists, they could never have any advantage. Then consider the length of time; after this he never to his death in 1787 thought of raising any part of this money; nor left among his papers any memorandum, by which he discovered an intention to make himself a creditor; nor any receipt or deed, by which it appeared, that these portions, when paid, were assigned to him,

nor

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nor affording any ground of intention, that they should remain a charge; nor did he take any notice of it in his will. I do not mean to dispute the rule now, which was recognized by your Lordship in *Jones v. Morgan*, 1 Bro. Ch. Ca. 206; but except that case, there is hardly a case, in which the rule has been considered. The case in *Vesey* is quite different. In *Jones v. Morgan* your Lordship thought, that *William Morgan* was to be considered as tenant in tail; there you laid down the general rule upon the cases of *Kirkham v. Smith* and *Amesbury v. Brown*; but said, it was only matter of inference, not *juris positivi*; and that the smallest demonstration, that he meant to pay it off for the benefit of the estate, would be sufficient to prevent the representatives from coming for the money; and that *William Morgan's* giving the bond himself, and paying the interest for seventeen years, was strong against the claim. Here there is an acquiescence by Lord *Shrewsbury* from 1742 to 1787; the length of time affords a strong ground for presuming, that he meant to pay it off for the estate. To this presumption add the release instead of the assignment, and the nature of the conveyance of 1751; also the circumstance, that Lord *Shrewsbury* might have looked at the limitations here, and seen, that no one of his descendants was ever to be owner of the estate, unless he should change his religion; but that the estate was unalienably annexed to his family, to whom it was natural for a person of his rank to wish the estate to descend free from burthen. The difference, when the remainder is limited to a stranger, and when to his own family, makes the presumption much stronger in the one case, than in the other; and here it is exactly, as he would have limited it himself. But if your Lordship thinks, Lady *Shrewsbury* has some right, the question is, to what extent. There is no case for the apportionment: nor is it wonderful; as there has been no \* case like this; where an estate has been unalienably annexed to a particular race of men, so as to give to each an estate for life only, without the absolute ownership to any; and where a charge is to be raised by so short a term as this; which does not much exceed the length of a man's life. The question has seldom arisen; as conveyancers take very long terms, so that one life would diminish them very little. Here it is considerably diminished. In 1742 eight or  
nine

nine years had expired. The justice of the case requires something to be done. There ought to be an apportionment. In such a term as this the tenant for life ought to pay some of the principal. He might have lived, till the term had so far expired, that there would not have been a sufficient number of years left to pay off the incumbrance. Such a term as this could not have been intended to be more burthensome to one than another; and his descendants are exactly in the same situation; upon whom the burthen could not be intended to fall instead of him. It is very hard, if forty-five years of the term remain: but put the case of ten or fifteen only. The burthen will fall upon the present Lord; and if he should die very soon, upon another, who will succeed to the same estate; and will utterly deprive those, who equally with the rest were within the intention of the parties, who created the term.

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Mr. *Lloyd*, on the same side.

Though I admit, that the rule was established, yet I wonder at it. It is, that, if tenant for life, or any other person in the same situation as to alienation, pays off a charge, either equitable or by mortgage, without any thing being said about it upon either side, in that case the representative of the tenant for life shall be a creditor. The Court in that instance has departed from its general rule of favouring heirs. In cases of merger, and of that kind, the Court has said, it shall fall into the estate. As to the second point it would be very inequitable to charge the whole principal upon the remainder of the term. The term is to take from the rents and profits, or by sale or mortgage; I must admit, they had a right to make a mortgage; but it was formerly the habit of the Court to make tenant for life in this way pay part of the principal. The terms have in general been longer; and though the Court has been lately in the habit of making tenant for life only pay the interest, there have been cases to the contrary. *Ryves v. Ryves*, *Prec. Chan.* 22. 2 *Eq. Ca. Ab.* 223, in which tenant for life was made to pay 700*l.* as his \* proportion of the capital, *Chiat v. Batteson*, 1 *Vern.* 404. 1 *Eq. Ca. Ab.* title “*Contribution*,” where there are more than two or three cases of that kind; from which cases it certainly was the practice  
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to compel tenant for life to pay one-third of the capital, before or while he was in possession (60).

Lord CHANCELLOR.

Suppose a third to be the proportion; is he to pay the interest of the rest besides? There could have been no period, in which the Court could have proceeded in that manner.

Mr. Lloyd.

The cases do not say, whether the remainder of the sum carried interest or not.

Lord CHANCELLOR.

I have no doubt upon either point. As to the first, it has been the wisdom of the administration of justice in this country in order to introduce some degree of certainty to lay down this rule; that the act of tenant for life in paying off a charge upon the estate shall *prima facie* be intended to make him a creditor. From the moment that is laid down, as far as this case is concerned, there can be doubt of that intention; it is rather fortified than diminished by what followed; for though it is true, that in 1742 an instrument was given, and accepted, purporting to be a discharge of the estate absolutely, yet that cannot be raised higher than as matter of evidence; for where without question he had expressed a contrary intention, the instrument itself would not have operated as a discharge. Therefore, as far as that, it might be a fair ground to infer, that he did intend to discharge the inheritance. But in a subsequent part, in a transaction between the trustees, the *cestuy que trust*, and every one entitled, there is in the recital a perfect and distinct recognition, that the circumstance of paying it off did make him a creditor; and it was recited for the very purpose of discharging him *eo nomine*. He took 1000*l.* in respect of a lease of part of the premises; and the recital, that he was entitled to the whole, was only in discharge of that title as to that part. After that it was impossible to contend, that this was not considered and treated as a charge. The true

(60) For the cases as to the *White v. White*, post, Vol. IV, fine for renewal of a lease, see 24.

true ground of the inference in favor of tenant for life paying off an incumbrance (61) is the scantiness of his estate; for he cannot be intended *primâ facie* to discharge it, because it would be discharging the estate of another person; and certainly he does so just as effectually and totally, where he discharges an estate, that goes on unalienably in one direction, as, when it is to be alienable; therefore in that point of view the inference arises as much in one case as the other. With respect to the other question, where the term is very short, it certainly does bring on that inconvenience, which must have come on in some period, if the term had been longer. If you carry it to 200 or 300 years, and there is an entail, it will fall upon those, who may make the estate absolutely their own; but here that cannot be done. As to that inconvenience, I cannot break through the general rule upon that account. If this was intended, it must be more express. Suppose, it had been provided, that the sum should be raised by instalments out of the rents and profits; it might have been easily arranged, if that had been the intention: but there was no such intention. Here it is expressly provided, that the trustees may raise by mortgage; and if a term was created to raise by the rents and profits, I should say, it might be done by sale or mortgage (62). Suppose, they had raised it by mortgage; the mortgagee would have held it as long, as there was sufficient left to pay him his money; and then it would have been wise in him to sell it for fear of losing part of his principal; it would be at his peril to let it rest so long as not to leave sufficient to pay him his principal. As to those cases cited by Mr. Lloyd; there must be some mistake in them; they are very short, and could not have been understood. They could not have ended there; for if so, no justice could have been done between the parties. Affirm the decree (63).

(61) See post, Vol. XV, 173. *Forbes v. Moffatt*, XVIII, 584. *Redington v. Redington*, 1 Ball & Beat. 131. *Earl of Buckinghamshire v. Hobart*, 3 Swanst. 188.

(62) *The Earl of Albemarle v. Rogers*, post, Vol. II, 477, and

the authorities collected in the notes, page 481, and XIX, 528.

(63) See *White v. White*, post, Vol. IV, 24. V, 554. IX, 554, as to charging tenant for life with a proportion of the fine on renewal.

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The true ground of inference for tenant for life paying off incumbrance is the scantiness of his estate; as *primâ facie* he cannot be intended to discharge the estate of another; and it arises as much, where the estate goes unalienably in one direction, as when alienable.

General rule not broke through on account of inconvenience.

Term to raise by rents and profits; trustees may raise by sale or mortgage.

Tenant for life is only to keep down the interest of incumbrance, but not to be charged with any part of the principal.

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LUCAS v. COMERFORD.

3 Bro. C. C. 166.

Lease deposited to secure a debt; depositary decreed to take an assignment, paying the costs of it; and cannot abandon; as, being entitled to a legal conveyance, Equity will consider him as having it.

Covenant to repair not executed by decree: whether covenant to build, *quare*.

BILL by executors of lessor against the depositary of a lease, to secure a debt, for specific performance of a covenant in the lease to rebuild houses upon the premises in the 11th year of the term, which was a term of 71 years to be held for the first 10 years at a pecuniary rent, for the 11th year at a pepper corn rent, and for the rest of the term at a pecuniary rent.

Defendant by his answer insisted, he was not bound to rebuild.

Mr. *Mitford*, for Plaintiff,

Cited the *City of London v. Nash*, 1 *Ves.* 12, rather more fully reported, 3 *Atk.* 512, where Lord *Hardwicke* decreed a specific performance upon such a bill as this.

Mr. *Mansfield*, for Defendant,

Said, there was no ground for the bill.


Lord CHANCELLOR.

It is no matter, whether Defendant took it as a pledge or as a purchase; he cannot take the estate, and refuse the burthen; it is nothing to the lessor. I am not inclined to follow that precedent of building a house under the direction of the Court any more than of repairing one (64). Defendant must take an assignment in order to enable the Plaintiffs to bring an action. I rather think upon reading the answer, that they would recover even without the assignment: but it is very just, that they should assign absolutely, and that the Defendant should take it; and this will come under the general prayer for relief. If he

(64) Post, *Lane v. Newdigate*, performance of a covenant to Vol. X, 192. *Pembroke v. Thorpe*, make good a gravel-pit refused, 3 *Swanst.* 437, note, and the re- *Flint v. Brandon*, XVIII, 159. ferences. In *Mosely v. Virgin*, Covenant, that lessee's elevation post, III, 184, Lord *Loughborough* thinks, an agreement to shall correspond with the adjoining houses, executed: *Franklyn v. Tuton*, 5 *Madd.* 469. build, if sufficiently certain, may be executed by decree. Specific

he does not that, he must at least account. I doubt, whether Defendant could abandon? put the case, that he had a good legal assignment instead of a deposit, could he as against the lessor abandon? I think, he cannot; because, as he has a title in equity *to have a legal conveyance, I must consider him as having it; and then it is not in his election, but in Plaintiff's, to make him keep it, and perform the covenants. Let there be an assignment, and let the Defendant take it, and pay the costs of it (65).

(65) 1 Mer. 264.

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HANKEY v. GARRATT.

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 3 Bro. C. C. 457.
 One partner absconded, and died abroad, but never was a bankrupt: separate commission against the other, under which the assignees seized joint effects. The joint debts are to be first paid out of the joint fund, the residue divided between the bankrupt's estate and the representative of the deceased partner. Assignees kept the fund eight

IN 1777 the partnership of *Wooldridge* and *Kelly* becoming insolvent, a separate commission was taken out against *Wooldridge*. *Kelly*, having absconded, died abroad, so that he could never be made a bankrupt. Under this commission all the effects of both partners were seized; and were assigned by the original assignees to *Garratt* and *Rowlatt*; who were appointed assignees in 1780. They made no dividend till 1788; when an order was obtained against them by some of the joint creditors for an account and dividend; but the Commissioners refused to make a dividend except as to a moiety of the joint effects. Some of the joint creditors petitioned the *Lord Chancellor* to have the joint debts satisfied in the first place out of the joint fund in the hands of the assignees; but the *Lord Chancellor* directed a bill to be filed; upon which in 1789 a bill was filed against the assignees for an account of the joint effects, which had come to their hands, and to have the joint debts satisfied with interest and costs, and against Mrs. *Wooldridge*, who, as administratrix of *Kelly*, claimed a moiety of the joint effects, and also insisted on retaining out of them in

preference

years without dividing; one admitted he had lent the share received by him at 5 per cent. the other that he had lent his share to a partnership, in which he was engaged, with his own money without any distinct charge of interest: decreed to pay such interest, as shall appear to have been made, and, where none, 4 per cent.

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preference to the joint creditors a sum of 2000*l.* due by bond to her from *Kelly*. *Garratt* by answer admitted, he had lent the share of the fund received by him to another partnership at 5 *per cent.*: and *Rowlatt* admitted, he had lent his share to a partnership, in which he was engaged, mixed with his own money, but without any distinct charge of interest for that.

Mr. *Hardinge* and Mr. *Mitford*, for Plaintiff.

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The joint creditors must now be paid out of the joint fund in the hands of the assignees under the separate commission. What pretence upon the obvious justice of the case have they to keep this moiety in their hands? The Court will take it into its * own custody, and no one can take it out without first paying the joint debts. All the parties are in Court; the deceased partner by his representative; who insists upon being paid before the joint creditors; the fund being in Court. It has been held, that partners are joint tenants of the fund, and to be considered so even after the dissolution of the partnership; each can act upon the whole. One partner has no right but by what is due upon an account. If the partner remaining here had taken, and used as his own, part of the share of the other, being abroad, the latter could not been relieved but upon terms of an account and just allowance. A surviving partner, as tenant in common with the representative of the other, is to pay joint debts first, and then account. If a separate creditor attaches in execution the joint fund, which he must always do, as it is (66) indivisible, the vendee under the execution and the other partner are tenants in common: and the former must hold it subject to all the rights of the other partner. There is no such thing as an undivided share of the partnership effects, except what results upon the account after satisfying the partnership debts. Thus the assignees of one partner stand in his place; and are tenants in common with the other; and when by accident there remains another moiety in their hands, they cannot part with it, unless upon an account; and the first step must be to pay the joint demands. No action of trover lies against either partner as between each other. Could *Kelly*, if alive, recover this moiety? If he
 came

(66) *Hayden v. Hayden*, 1 *Salk.* 392.

came forth at all, he would be either a bankrupt, or would pay his creditors. The consequence of bankruptcy between two partners is, that they are still entitled to the balance of the account. *West v. Skip*, 1 *Ves.* 239, 456. *Fox v. Hanbury*, *Cowp.* 445, are authorities for these positions (67). *Ex parte Voguel*, 1 *Atk.* 132, the Court directed the assignees immediately to sell all the effects under the separate commission, and to deposit it in the Bank, leaving the parties, as here, to make out their equity by bill. 2 *Vern.* 293, *Gonson* a partner embezzled part of the fund, and failed; application was made to the Court by the other partner to be paid out of the share of *Gonson* for that embezzlement; and it was decreed, first, that all the estate should be sold and the produce divided among the joint creditors; after that it would be seen, what *Gonson's* share would be; * and out of that he should answer. In *Goss v. Dufresney*, *Davies*, 371, 1 *Cooke's Bankrupt Law*, 163, 297 (68), the Court ordered the whole estate to be sold, and out of the embezzler's share of the surplus the amount to be answered. Nor is there any difference between the circumstance of *Kelly's* coming into Court, if he had been alive, and his representative coming; for neither could have execution against the joint fund without submitting to the terms of an account; nor does Mrs. *Wooldridge's* being a specialty creditor signify; for nothing is *Kelly's*, till the joint debts are satisfied. Then as to interest, all the joint fund, received by these assignees, was used as their own; *Garratt* admits receiving 5 per cent. interest; and *Rowlatt* does not deny making profit; and admits, this fund was used, mixed with his own, by his trade: from which, it must be concluded, he made interest of the whole. Your *Lordship* has often determined, that trustees, using trust money as their own, shall answer for what would be the interest in the hands of the party entitled; as in *Forbes v. Ross*, the other day; in which trustees, who had made use of the fund, were compelled to answer for it. The delay is a sufficient ground for costs. In 1788 under an order they delivered in an account full of error; but even upon their own shewing 2952*l.* against them. After
a dividend

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(67) 2 *Term Rep. B. R.* 682.

(68) 8th edit. by Mr. *Roots*, 258, 522.

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a dividend then made they admit receiving upwards of 2000*l.* more, and after great delay occasioned by obtaining frequent orders for time to answer, and to examine witnesses in the country, which never was done, and by putting in evasive answers, when they were at last forced to answer, they made a question before the Master, whether they had occasion to answer at all as to the interest?

Solicitor General and *Mr. Mansfield*, for the Assignees.

The principle of bringing the bill admits, that the fund was not to be distributed under the bankruptcy. If *Kelly* was alive, and had received any part of this fund, and had paid some of those joint creditors, who did not come in under the commission, the rest could not have quarrelled with it; the principle of the cases cited go to all the joint creditors as well as those, who have come in under the commission. The assignees took the best advice; and were told, that they could not divide with safety. The delay has been as great on the other side by repeated amendments.

[239] *Mr. Graham*, for *Mrs. Wooldridge*, administratrix of *Kelly*, was not prepared to argue the point for her, not expecting the cause would have come on.

Lord Chancellor.

Her point will be, that she, as a separate creditor, will have a right to come upon the joint fund, before the joint debts are paid. Upon the decree, I am to make, it is not necessary to argue that now; if you can make it out, when the account comes in, it will do; if you cannot, the joint debts must be paid first. Decree an account of what both assignees have received from the joint estate of *Wooldridge* and *Kelly*, and also of the separate estate of *Wooldridge*, come to the hands of *Garratt* and *Rowlatt* or *Mrs. Wooldridge*. An inquiry, whether the assignees made actual interest. But it will be difficult to go upon the profits. If trustees will adventure the fund of an infant in order to make profit of it, you may come at it; but it must be a single fund: it is a difficult inquiry. Take generally such interest as shall appear
to

to have been made of (69) it; and, where none, then four *per cent.* from the time it has been employed. An inquiry after all the joint creditors; the bill ought to have been on behalf of these creditors generally, not those only, who have sought relief under the commission. Then declare, that the joint debts are to be first cleared; and that the residue is the fund to be divided between the bankrupt and the representative of the other partner. Where one partner is a bankrupt, the other solvent, there could be no justice except by taking an account of joint debts, and liquidating the joint estate among the joint creditors; for what the assignees take they would hold as tenants in common, and subject to the joint debts. It must be, if by will, upon the part of all the creditors; for it is considered as a fund, which the bankruptcy cannot clear (70).

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Application to have 3166*l.* 16*s.* 4*d.*, admitted to have been received by the assignees, brought into Court, which was ordered, without prejudice to the account to be taken: and to be laid out, &c. Farther directions and costs were reserved, with liberty to apply.

On the 8th of *February*, 1792, this cause came on upon the report for farther directions before *Buller*, J. sitting for the *Lord Chancellor*.

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It appeared by the report, that both assignees had made actual interest.

(69) Executor ordered to pay interest, 2 *Ves.* 85; especially if he uses the money, which it will be presumed he does, if he does not apply it to the uses of the will, or bring it into Court: 1 *Bro.C.C.* 359. Same decree against administrator, who had made interest, *ibid.* 375; and against assignee of a bankrupt, who kept money in his hands, *ibid.* 384. See *Hilliard's Case*, ante, 89, and the references in the note, p. 90.

Post, *Taylor v. Fields*, Vol. IV, 396. XV, 559, n. *Lodge and Fendal's Case*, IX, 589. X, 98. *Barker v. Goodair*, XI, 78, 85. *Young v. Keighly*, XV, 229, 557. *Ex parte King, Dutton v. Morrison*, XVII, 115, 193, 407. *Brickwood v. Miller*, 3 *Mer.* 279. *Allen v. Kilbre, Ex parte Watson*, 4 *Madd.* 464, 477. *Wait's Case*, 1 *Jac. & Walk.* 605.

(70) 2 *Bro. C. C.* 5.

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Upon the point raised by Mrs. *Wooldridge* Mr. *Mitford*, for Plaintiffs said, she could not demand any part from the assignees in possession of the fund; that there might be a difference, if she was possessed of any of the effects: though even in that case *Goss v. Dufresney* before Lord *Talbot* in *Davies's* and *Cooke's Bankrupt Laws* has decided the question; that where there are partners, and one is insolvent, the whole partnership property is to be applied to the partnership debts, whether the other is insolvent or not; for the assignees of the insolvent partner become immediate tenants in common with the other, liable to all the partnership debts, and entitled to no more, than the partner would have been entitled to; namely the balance.

Mr. *Graham*, for Mrs. *Wooldridge*.

This is a bill by joint creditors against assignees, possessing under a commission against one the whole property. A seizure under a commission of bankruptcy is understood to be in nature of an execution at law; and in that case the creditor of the partner, against whom there is judgment, is only entitled to a moiety. Therefore it is clear, the assignees are only entitled to a moiety; and then the question is, for whom they are trustees as to the other moiety. Are the joint creditors to have a greater advantage by the circumstance of the assignees going beyond their power, than if they had only taken, what they were entitled to? Having a right to resort to the solvent partner, they ought not by that tortious act to be in a better situation than the other creditors of the solvent partner. She therefore ought to hold it for an equal distribution as well among the separate as the joint creditors.

Judgment
against one of
two partners,
execution to
be only of a
moiety: But
in Equity upon
the failure of
one the part-
nership fund is
to be distribut-
ed among the
joint creditors.

BULLER, J.

This is not exactly the case of an execution at law. There, I admit, in case of judgment against one the joint estate is only * to be taken as to a moiety: but that is not the rule of this Court. At law it is a separate debt; but in this Court they have gone farther; and for many years past it has been the practice upon the failure of one of the Court to say, the partnership fund shall be distributed, as far as it will go. The accounts are distinct; and the partnership fund is primarily
liable

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liable to the joint creditors; therefore she has no claim till all the joint debts are paid.

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Plaintiffs did not apply for costs as against the assignees, but desired, they should come out of the fund as between Solicitor and Client.

HARE v. SHEARWOOD.

1790.

Nov. 9th.

3 Bro. C. C. 168.

Mr. Justice BULLER, for Lord CHANCELLOR.

BILL to redeem an annuity of 50*l. per annum* purchased by *Haynes* from Plaintiff for 300*l.*; and to have the joint bond of Plaintiff and his father delivered up, with the warrant of attorney to secure the annuity; and for an injunction from proceeding to sue out execution upon the judgment. Bill charged* an agreement at the same time with the grant of an annuity, that upon 14 days notice it might be redeemed at any time. Defendant by answer denied any knowledge of such agreement, and submitted to do, what the Court should think proper.

Parol evidence not admitted to prove an agreement, made upon the purchase of an annuity, that it should be redeemable.


Mr. Mansfield, for Defendant

Opposed reading parol evidence of the attorney, employed in this transaction, offered by Plaintiff to prove this agreement. He said, this point had been finally settled in *Lord Irnham v. Child*, 1 Bro. Ch. Ca. 92; and there it was suggested, that the reason, why the clause of redemption was not inserted, was, that it would have been usurious; but Lord Chancellor thought, that made no difference; and as there was no fraud to keep out the clause of redemption, he would not admit the evidence.

Solicitor General, for Plaintiff.

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That case is different from this; for there the party, against whom the redemption was sought, denied the fact of the agreement, upon the principle of which it was sought. I acknowledge the general rule not to admit parol evidence against a written agreement; but if it is stated, that at the time the agreement was entered into, the parties meant and agreed,

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agreed, that it was only to be made a particular use of, and the Defendant admits or does not deny that, but puts in this answer, that he does not know, whether the agreement was such or not, but leaves the Court to do what is proper, he says he does not resist the decree, if the Court can be satisfied, that the agreement existed, which he does not deny; and therefore if the Court can be satisfied, that it did exist, it may proceed to relieve the party. Suppose use had been made of this judgment, and execution had been taken out upon it; if there is evidence, that one party was induced to execute the agreement, under a persuasion that in particular circumstances it should not have the effect, it otherwise would have, and if the other party does not deny that, but leaves them to make it out, even a Court of Law will relieve. If Defendant will neither admit, nor deny, he refers to proof.

For Defendant.

The distinction taken will go to all the cases, where the evidence is necessary; in all cases where this evidence is raised, there must be a denial of the fact to be proved, or something equivalent, else there is no occasion for the proof. Here it is become necessary for the Plaintiff to prove this agreement. Defendants are executors and trustees for infants; they only say, they know nothing about it; and therefore leave him to make out his case, if he can; and are right in so doing as trustees and strangers to the transaction. The bill ought to be dismissed with costs.

BULLER, J.

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This is an attempt to carry the rule of evidence in this Court farther, than has ever been done; and it is not supported by any precedent or authority, but only by an ingenious argument to raise a distinction between this case and the case cited. In principle there is none; for this is not one of the excepted cases * in this Court, which are cases of fraud, and where the party will admit there was some agreement (71).

Here

(71) *Pitcairn v. Ogbourne*, 2 Ves. 375. *Mitf.* 211. As to part answer, insisting upon the statute, performance, post, 333, in *Brodie* see *Cooth v. Jackson*, post, Vol. v. *St. Paul*. As to the effect of VI, 12^s

Here there is nothing to be examined into, but to see whether it is incumbent upon Plaintiff to prove this agreement in order to obtain a decree. If it is necessary for him to prove it, it must be by legal evidence; and that he cannot have. I do not see, that he has any business here at all; he ought to have gone to law for any justice, he might be entitled to. If there he can avail himself of his parol agreement against the general rule of law and equity, he may; but I am only to pronounce, what that rule is; and I am of opinion upon the case cited, and many others, that such evidence cannot be admitted. As to the costs, I think, it would be right to say here, that in all cases where a man has got such an annuity as (72) this for six years purchase, he may as well pay his own costs (73).

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On a written agreement parol evidence admissible in equity in cases of fraud, and where party will admit there was some agreement.

(72) The life was only 25 years old. ing held inadmissible after the death of one of the parties.

(73) Upon application to the Court of Common Pleas, where the judgment was entered, the same evidence was refused, be- 1 *H. Blackst.* 659. See the note to *Pym v. Blackburn*, post, Vol. III, 38. *Marquis Townshend v. Stangroom*, VI, 328.

ATTORNEY GENERAL at relation of BISHOP of LONDON, v. COLLEGE of WILLIAM and MARY in VIRGINIA, the CITY of LONDON, and OTHERS. 1790. Nov. 12th. 3 *Bro.C.C.* 171.

MR. BOYLE by will 1681, and codicil 1691, gave the residue of his fortune to be laid out by his executors for charitable and other pious and good uses at their discretion; but recommended, that the greater part should be employed for the advancement of the Christian religion among Infidels. There was no other than that general direction. The executors agreed to lay out 5400*l.* in the purchase of the manor of "A"; which was purchased accordingly, under a decree of the Court, ratifying the agreement; and conveyed by the executors to the *City of London* upon trust to lay out the rents and profits in the advancement of the Christian religion among Infidels, as the Bishop of *London* for the time being, and Lord of America,

and therefore not now liable to controul of the Court. Interest under power of appointing the application of a charity not sufficient to sustain a bill.

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LONDON.

Lord *Burlington*, one of the executors, should appoint; the appointment to be confirmed by decree of this Court. The trustees appointed the rents and profits to be paid to an agent in *London* for the College of *William and Mary in Virginia* for this purpose; that the College should maintain and educate in the Christian religion so many *Indian* children, as far as the fund would go; and they ordered, that the President, &c. of the College should transmit particular accounts, of what sums should be received by them, and laid out; and that they should be subject to rules given then till altered. This order was ratified by a decree of the Court. The cause came on upon an information and bill at the relation of the Bishop of *London* for the purpose of having the disposition of this charity taken away from the College, because emancipated from the controul of this Court; and for liberty to lay before the Master a new scheme for the future disposition of it, and for a sum of 13,000*l.* in Court, the produce of timber cut down, and for an account against several persons, who were receivers or agents, through whose hands the money passed: but as it appeared, that of those people, against whom the account was sought, some, though appointed receivers, had not received any thing; and others, who were agents, had made up their accounts fairly, the *Attorney General* at the hearing gave up the demand of the account against them.

Attorney General, for the information.

Circumstances are now very different from what they were, when the decree was made, under which this plan was adopted. The present situation of the colony of *Virginia* is such, that, if this fund passes through the hands of the College, this Court cannot see to the application of it according to the testator's intention, regulated by order of this Court. The mode of applying the charity, hitherto used, is now become improper; it is therefore necessary to find some other mode of applying the charity, reserving the object; and for that purpose the Bishop of *London*, now the only surviving trustee, ought to be at liberty to deliver in fresh plans. The College state their claim to apply this Charity as servants of this Court thus:—That they had a charter of incorporation from

from *King William* and *Queen Mary*; and there they stop short, and do not claim as such corporation. Whatever was their former situation, they are now no longer a corporation with respect to this country, as a creature of the great seal of this country. They merely say, that it is possible, that the Charity may be applied by them, and therefore submit, * that it ought; but it cannot, as the controul of this Court over them is at an end.

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Mr. *Mansfield* and Mr. *Mitford*, for the College.

There is no reason to disturb this. The present application of it is as near the intention of the testator, as any plan can be. The change, which has taken place, has not produced any impossibility of inquiring into their conduct. The alteration is merely the relinquishment of the government of that country by this. All, that was done by the treaty, was to acknowledge them independent; every thing else remained as before. It must be presumed, this College remains in the same situation as before the separation, except in this single instance. The application of the money can be managed as well now as before by accounts properly transmitted to the officer of this Court. Even a conquered country remains in the same situation, till the conquering power alters it. There has been a case like this; that of the Convents in *Normandy* and other *English* provinces in *France*, which possessed considerable lands in this country; and when they came under the dominion of *France*, they still continued to hold their property here till the time of *Henry the Vth.* (74) and though from time to time it was confiscated upon account of war, yet it was restored with peace. There is nothing in the information suggesting a doubt, that this corporation does not continue. They are sued now as a subsisting College, and put in their answer as such. They state by their answer, that a considerable sum is due to them for educating and maintaining children according to the intention of the testator; and therefore, if they are no longer to be entrusted with this fund, yet they are creditors for so much, and ought to be satisfied for that debt.

(74) 2 *Inst.* 583. 1 *Bla. Com.* 386. 4 *Bla. Com.* 112. 1 *Rap. Hist. Eng.* 509, 2d edit.

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In the schedule to their answer they only use the general word "*expenditures*" though ordered by the decree to transmit particular accounts.

*Lord CHANCELLOR*, to the Counsel for the College.

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Costs of course out of the fund to agents, receivers, and trustees, who have accounted fairly and paid money into Court. Costs cannot be given to a College individually, nor as a Corporation, unless proved so.

Where is the *scire facias* in case of misbehaviour? Suppose your doctrine relative to the conquest holds by analogy to the \* actual state of *America*, you must suppose, they might be reformed by *scire facias* in their own Courts, for it certainly could not be in the Courts of the conquered Prince. As to the case of the Convents the same thing happened to the *Knights Templars*, and to the *Knights of Malta*; they were religious institutions, and it turned entirely upon that. The Bishop of *London* seems not to have a sufficient interest in this fund to sustain a bill: it must be dismissed as to him; the information was proper, but the bill improper. If the agents and receivers have accounted fairly, why should they have costs? If trustees have fairly accounted, and paid the money into Court, their costs are of course; therefore those persons ought to have them out of the fund (75). I am inclined to give the costs of the College also: but I think it a little irregular. I cannot take notice of them as a corporation; you have not proved them an existing corporation at all; nor can I give them costs individually. Give the *City of London* and the other Defendants their costs.

(75) *Beames on Costs*, 146.

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On information for a charity relator appearing to have no title, there can be no decree but to dismiss the information,

and in that case costs cannot be given out of the charity.

ATTORNEY GENERAL v. OGLENDER.

A QUESTION between two charities, one of poor people in ——— parish in the county of *Gloucester*, the other of poor widows in an alms house, concerning the right to a legacy given by a will, in which there were descriptions applicable to both. The information was at the relation of the latter; but the *Lord Chancellor* was of opinion, they were not intended by the testator.

*Attorney General* contended, that the Court in general is not contented to say, the party is not entitled in cases of charities, but have gone farther by declaring, who is entitled; for otherwise it may be said, the information was dismissed for want of parties, or for some informality. In *Attorney General v. Parker*, 1 *Ves.* 43, and *Attorney General v. Smart*, *ibid.* 72, and 2 *Ves.* 426, Lord *Hardwicke* recognizes the general rule, that though the prayer of the information does not exactly go to it, yet the Court will \* settle the right. This doubt was raised entirely by the testator, who adopted part of each description. Costs ought to be out of the fund.

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Lord CHANCELLOR.

The consequence of dismissing the information appears to be, that the relator had no title. If I keep it, I must decree first, that the relator has no title, and upon that information gave directions, how the charity shall be administered to those, who have title. I doubt, whether that is the practice. As to the costs, if you have totally failed, you cannot have them (76), the utmost you can claim is to discharge it without costs. The *Attorney General* is a public officer; and therefore may act for the Charity; but I believe, it has been held, that an information without any relator would not do (77).

*Attorney General.*

That is upon the principle, that there is no security for the costs of Defendant.

Lord CHANCELLOR.

If I give costs out of the Charity, I ought to give a decree; which I cannot do, unless those cases, which I will look at, induce me to alter that opinion.

(76) See the note, ante, 205. concerns those, whose rights the

(77) 1 *Ves.* 72. 2 *Ves.* 327. When Crown takes under its particular information only concerns the protection, there is *always* a re- rights of the Crown, relator is lator; who in reality sustains and sometimes named; but when it directs the suit. *Mitf.* 90.

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## DAVIES v. AUSTEN.

3Bro.C.C.178.

Legacy payable at twenty-one with 5 per cent. till payable. Executrix advanced a sum larger [\*248] than the legacy by discharging disbursements, all paid *bond fide* for the infant, though some were improper. Legatee when of age assigned the legacy. Assignee entitled against executrix to the legacy with 4 per cent. from the time it was payable.

**WILLIAM HORATIO GREENE** was legatee of 500*l.* payable at 21 with interest at 5 per cent. till payable. It was not given over in case of his death under 21. Defendant was executrix, and advanced more than the legacy, viz. 650*l.* before he came of age, by reimbursing the father in law of the infant, who took charge of him at the Charter school, but upon his discovering \* an inclination for the sea put him apprentice to the Captain of a *West India* ship with a fee of 100*l.* After some time he became so disgusted with that profession, that it became necessary to take him from it. He then chose to go to *India*, and 100*l.* more was expended for his passage. It was stated by the Counsel for Defendant, that they could prove, that in all 650*l.* was advanced for necessary expences. In 1786 he came of age, and immediately assigned the legacy to *Davies*, who brought the bill against the executrix.

*Solicitor General*, for Plaintiff

Said, full consideration was given for the assignment, viz. 625*l.*

*Attorney General* and *Mr. Sutton*, for Defendant.

This is the case of a child destitute in every respect except this small legacy; the interest of which was not sufficient to put him out to any advantage. It does not appear, what was the consideration given; it may be an experiment to get this assignment into his own hands. It took place immediately after he came of age. *Philips v. Paget*, 2 *Atk.* 81, payment of legacy by executor to minors good, by Lord *Hardwicke*; who said, he would not strain the rules of the Court to make executor pay it over again; especially as he paid it, to save a forfeiture of what he took under the will; it being an express condition of his taking, that he should discharge the legacies within a limited time. 1 *Vern.* 255. It was objected, that only the bare interest of the money should have been expended for maintenance; but the *Lord Keeper* thought it right to expend the whole; as the sum was small; and probably would be expended



pendent more to his advantage at that time than afterwards; but said, it would be otherwise if a larger sum, as a legacy of a 1000*l.* therefore there are instances, in which the Court has considered the situation of the parties, and all the circumstances; and no precise line has been drawn. *Marlow v. Pitfield*, 1 *P. Will.* 558. Infant borrowed money and applied it to payment of debts for necessaries; he was held liable to pay this in equity, though not at law; for the lender of the money stood in the place of the person paid, viz. the creditor for necessaries; and shall recover in equity; as the other might at law.

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*Solicitor General.*

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In *Philips v. Paget* Lord *Hardwicke* changed his opinion next day.

*Lord CHANCELLOR.*

I agree with Lord *Hardwicke* in not being inclined to stretch the rules of the Court; though I do not understand, that he was doing so there. The reasons given by the reporter in that case were made for alteration. It is as ill reasoned, as can be; what is said about the forfeiture is idle; it is impossible to suppose, that Lord *Hardwicke* could have given such reasons. They do not argue, how it would have been in this case, if the infant was Plaintiff himself. Every man, who takes an assignment of a chose in action, gives personal confidence, that there is no lien upon it. It is not possible to give the executrix more than the interest up to 1786, when he came of age. The case, you mentioned last, was in my contemplation; you may recover against an infant for necessaries; but there is this difference; that where a stranger advances money, he will have a little more consideration than a trustee, charged with the care of paying an infant, when of age, a sum of money, would be allowed. Defendant must pay 500*l.* with interest at 4 *per cent.* from the time he came of age (78).

Infant liable for necessaries; but more consideration will be had for a stranger advancing him money, than for his trustee.

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(78) Post, *Lee v. Brown*, Vol. *Thornton*, 3 *Bra. C. C.* 60, 186, IV, 362. *Walker v. Wetherell*, and *Dagley v. Tolferry*, 1 *P. Will.* VI, 473. *Ex parte M'Key*, 1 *Ball* 285; better reported 1 *Eq. Ca. & Beat.* 405. As to payments *Ab.* 300. made to the father, see *Cooper v.*



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Lockyer, until his son *John*, or any other of his younger sons, shall attain 21, which shall first happen; in case he shall have no younger son, that shall live to attain the said age, then until such only son shall attain the said age; in trust that the clear rents, issues and profits, of the premises, (after all charges and reparations deducted) except a dwelling-house at *Ilchester* and the gardens and orchard thereto belonging, which the testator directed to be enjoyed by him for his own use for the term above mentioned, be preserved and improved, and the same with the produce thereof be laid out and employed in manner as is herein after directed with regard to the overplus of his personal estate; and when and as soon as his said nephew *John Lockyer* or any other of the younger sons of his said brother *Thomas Lockyer* born or to be born shall attain 21, then he gave his said dwelling-house, orchard, and gardens, and all other his said lands and hereditaments, thus charged as aforesaid, unto his said nephew *John Lockyer*, or unto such other, as for the time being shall be a younger son of his said brother, and shall first attain the age of one and twenty years, and to the heirs and assigns of such respective younger son for ever; but if his said brother shall have but one son that shall live to attain the said age, then he gave the same unto such only son his heirs and assigns for ever. The testator then reciting, that his brother *Thomas* and his eldest son *Joseph Lockyer*, or one of them, was entitled to the fee-simple or other estate of inheritance in lands called *Chester Meads* in the county of *Somerset*, directed, that if his said brother or his son *Joseph* or such as shall have a legal title thereto shall convey the said lands to the same uses, intents, and purposes, as near as may be, as the testator's said lands and hereditaments are hereby devised, that there be paid to the said *Joseph Lockyer* or to such in whom the said premises shall be then vested, and shall execute such conveyance, the sum of 3000*l.* out of his personal estate, in lieu of the lands to be thus conveyed and settled as aforesaid; and as to his personal estate, after his debts, legacies, and funeral expences deducted, he gave the same to his said brother *Thomas Lockyer*, whom he made his executor, in trust that he improve the same in the best manner as he shall think proper, until such son, as will be entitled to his lands, shall attain the age of one

one and twenty years; and then to lay out the same and the produce thereof in the purchase of other lands of inheritance, and do settle and assure such new purchased lands to and for the same uses, intents, and purposes, as near as may be, as his lands and hereditaments are devised; and he declared his will, that no part of the estate thereby devised be applied to the maintenance or education of his said brother *Thomas's* sons during their nonage; but that his said brother be at the sole charge of such their maintenance: and in case his said brother *Thomas* shall have no son that shall so attain the age of one and twenty years, then he gave unto his niece *Betty Cleeve* the sum of 500*l*. And all the residue of his estate, both real and personal, he gave unto his said brother *Thomas*, his heirs, executors, and administrators. The testator died in *November* in the same year, leaving his brother *Thomas* his heir at law, and *Joseph Tolson Lockyer* and *John Lockyer*, jun. the two sons of *Thomas* then living; who were his only issue. *John Lockyer*, jun. the younger son of *Thomas*, died in 1751 under 21, by which *Joseph Tolson Lockyer* became, and continued till his death, the only son of *Thomas Lockyer*. In 1752 he married *Maria* ———, and by his will, dated the 26th of *September*, 1759, devised as follows: “As to such worldly
“estate of what nature or kind soever, whether in possession,
“reversion, or remainder, wherewith it hath pleased God to
“intrust and that I shall die seised or possessed of, interested
“in, or entitled unto, invested in or that shall belong to me at
“my decease, wheresoever or howsoever, in any manner or
“wise, the debts, which I shall owe at the time of my decease,
“and my funeral charges and expences being thereout first
“deducted, paid, and satisfied, I do give, devise and bequeath
“the same and every part and parcel thereof, fully, wholly,
“and absolutely unto my dear wife *Maria Lockyer*, to be
“by her, her heirs, executors, administrators, and assigns,
“peaceably and quietly held, occupied, and enjoyed, for ever,
“free from the claim or demand of any other person or persons
“out of, from, or to the same, or any part thereof;” and he appointed his wife executrix. *Joseph Tolson Lockyer* died in *January*, 1764. *Thomas Lockyer* upon the death of his brother *John Lockyer* entered upon and took possession of his real and personal estate. *Joseph Tolson Lockyer*, having at-

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tained the age of 21 upon the 15th of *February*, 1749, was by his father put into possession of the house, garden and estate of the testator *John Lockyer*: but a short time afterwards *Thomas Lockyer* re-entered on said estates; and continued in possession thereof and receipt of the rents and profits and produce of the real and personal estate of *John Lockyer* till his death in *July*, 1785. By his will, made shortly before his death, he gave all his real and personal estate to his executors, upon trust to pay the interest, dividends, and produce of the personal, and the rents and profits of the real, to the separate use of his daughter *Mary Smith* for life; and on her decease, as to the personal estate, to pay the principal to her children according to her appointment, if more than one; in default of appointment, equally; and if but one, to that one; and on the decease of his daughter, he gave, devised, and bequeathed, his real estate to her son *Thomas Smith*, his heirs and assigns for ever. No part of the trust property was ever laid out in land. The bill was filed by the widow of *Joseph Tolson Lockyer*, then *Maria Perry*, claiming under his will against the devisees of *Thomas Lockyer* and against *Edward Williams*, heir at law of the testator *John Lockyer*, *Joseph Tolson Lockyer*, and *Thomas Lockyer*. The heir at law contended, that the disposition could not vest in *Joseph Tolson Lockyer* till the death of *Thomas Lockyer*; but the *Lord Chancellor* thought, and this day recognized his opinion, that it vested in *Joseph Tolson Lockyer* by executory devise, subject to be divested by the birth of another son of *Thomas Lockyer*; till whose death it was not complete; because till then uncertain, whether there would be another son or not. After a decree establishing the wills and directing the necessary accounts and inquiries, the following point was this day argued by permission of the *Lord Chancellor*, though irregularly, upon a motion to vary the minutes; viz. whether the rents and profits of the real estate, which accrued subsequently to the making the will of *Joseph Tolson Lockyer*, passed by that will to the Plaintiff, or whether, having been directed by the will of *John Lockyer*, sen. to be laid out in land, they were not to be considered as land, and to go to the heir at law.

Attorney General, for the Defendant.

The question is, over what part of the rents and profits the
 decree

decree made ought to extend. By the original will the rents and profits are to accumulate, to be laid out in land when the person, in whom the estate is to vest by it, shall attain twenty-one; therefore they are as real estate. Being received for many years after the will, they are real estate acquired by *Joseph Tolson Lockyer* after the date of his will; and therefore they do not pass by it. It is clear, that at law by the terms of the Statute of Wills it is necessary that the devisor should be seised of the lands devised at the time of making his will; otherwise they will not pass by it, unless there is a republication; so here, the acquisition of that money being after the will, it will not pass. It is determined, that if a person after making his will, contracts for lands, they will not pass to the devisee; but will go to the heir; and so must these rents and profits.

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Lord CHANCELLOR.

What would be the case of lands contracted for before the will, and purchased after?

Attorney General.

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.They would probably pass by relation to the original contract: but here Plaintiff has no claim but from the will itself, and cannot refer to any thing preceding it.

Lord CHANCELLOR.

All the cases (82) upon that were, I believe, in this Court; I do not recollect any case upon it in ejectment at law.

Mr. *Lloyd*, being asked by *Lord Chancellor* whether he recollected any case upon it at law, said, he did not, and that the land would not pass at law.

(82) See these cases, and most of the others upon the law of re-
vocation very fully considered in
Brydges v. The Duchess of Chandos,
Williams v. Owens, *Cave v. Holford*,
and *Harmood v. Oglander*, post, Vol. II, 417, 595, 604.
III, 650. VI, 199. VIII, 106.
Vawser v. Jeffrey, XVI, 519.
Rawlins v. Burgis, 2 Ves. & Bea. 382.

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*Attorney General.*

By this will he devised every thing of every description, of which he may be possessed or seised at his death ; but he does not alter the nature of the property ; though he might have done so. Such as it was, it must continue ; as no alteration was made.

*Mr. Mitford, on the same side.*

This is real property. I do not dispute, that he might have converted it into personal property ; though perhaps that is doubtful ; but he has done nothing to shew, he meant to alter it, and that the devisee should not take each according to its nature. For that there must be two operations of the mind ; first to convert it, and then to dispose of it, so converted : here there is but one. Suppose the question between the heir and personal representative, the heir would be entitled ; as there is nothing to shew, the testator meant to change the nature of the property. This point has been determined in other cases ; in *Guidot v. Guidot*, 3 *Atk.* 254, property under this description passed as real ; *Linguen v. Souray*, *Prec. Chan.* 400, 1 *P. Will.* 172 ; upon which your Lordship proceeded in the late case of *Rashleigh v. Master* (83). The question then is only, whether as real he could dispose of it. Under the Statute of Wills he could not dispose of a subsequent purchase, even if he was to say, “ *all the property, he may be entitled to till his death.*” This is property, in which not only his interest is future, but the property itself was not in existence, \* when he made his will. The decree proceeds upon the idea, that this property thus accruing from time to time, might be laid out in land.

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*Lord CHANCELLOR.*

You now go for such rents and profits, as accrued after making the will ; and give them the whole body of the personal estate, and all the rents and profits, that accrued before the date of the will.

*Mr. Mitford.*

We must give them those, unless we can dispute the disposition of a possibility by will (84).

(83) *Ante*, 201.

the produce of the personal

(84) The title of the heir to estate after the will seems  
 equally

*Lord CHANCELLOR.*

You cannot do that since the late case ( 85 ) in the Common Pleas upon this will. The whole difficulty is, that any equitable interest in land is disposable in this Court; though it would not be good at law, yet it will in this Court.

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A possibility  
is devisable  
(86).

*Mr. Mitford.*

This Court determines upon the same principle as at law; therefore where a man has contracted, the Court determines it to be that specific land, upon which there was an equitable lien. Here it was not so; nor was it in existence, though it had a possibility of a future existence; so it was a possibility upon a possibility.

*Lord CHANCELLOR.*

The question is, whether it is an equitable interest in land. Any equitable interest is devisable. Is there any instance of any sort of equitable interest, of any thing, which the conscience of another is obliged *præstare*, which is not held in this Court to be capable of disposition by will? Whether property under circumstances is to be considered as real or personal, has often been a question; but I do not conceive it possible, that in this Court the will should not reach \* this. I agree with the Counsel for the heir as to the law; it is certainly so; a man cannot by any words devise land

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Testator cannot

by any words devise lands either under the statute, or at common law,

equally available with his title to the produce of the real; the direction to lay out in land, by which alone he could be entitled to either, extending to both.

3 *Term Rep. B. R.* 88. *Pollexf.* 44. *Fearne*, 3d edit. 440. Post, Vol. XVII, 182.

(86) If coupled with an interest, 3 *Term Rep. B. R.* 93 96.

Post, Vol. VII, 300.

(85) *Roe, ex dem. Perry v. Jones*, 1 *Hen. Blackst.* 30, and

which he had not at the time of making the will. In cases of con-

tracts for land before, but executed after, making a will of land the subsequent execution is not a revocation; the legal interest coming in *esse* afterwards would not pass by the will at law, but in Equity is bound by the prior devise of the equitable interest.

Executory devise is in its nature equitable, and becomes legal estate only by application of the statute of uses, which executes every species of interest, that a Court of Equity would before; and that has been extended to cases not in contemplation of the statute.

An equitable lien is an equitable obligation to do according to conscience, and a devise of it good in Equity.

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under the statute of Wills, or at Common Law, (for the statute is founded upon the custom) which he had not at the time of making the will. The conscience of the heir has always been bound in all those cases of contracts executed after making the will; because the thing, given by the will, is the equitable interest; the legal, not existing at the time, would not pass; but, coming in *esse* afterwards, it is bound by that devise, which carried the equitable interest. It is laid down, and rightly, that it is not a revocation; as, though it was a conveyance of the whole fee, yet on account of the prior equitable interest the Court held, that it would not affect the devise; and if the Court could not assist this case, the party could only recover damages for breach of the covenant, and would not get the land at all. The question at law is more difficult than the question in equity; for, till this was decided at law, it passed in my mind as fixed, that an executory devise was not "*land had*" in the contemplation of the statute. I do not know, how the Courts of Law considered an interest under an executory devise as transmissible by will, unless they reasoned it, as I put you to argue it, viz. that an executory devise is in its nature an equitable interest, and only becomes a legal estate by the application of the Statute of Uses, which is universal in its expression; and therefore every species of interest, which before the Statute of Uses a Court of Equity would execute, the statute has directed to operate in the same manner, as before it would in conscience; and that has been extended to cases not in contemplation of the statute; for though there are many cases of the fee in abeyance, or, as Lord Coke has it, *in nubibus*, this is not one of those, which at that time occurred. When this was argued at law, they found, that, provided the statute had not executed it, but that it was only an equitable lien, which, properly defined, is an equitable obligation to do according to conscience, a Court of Equity would have effected such a devise; and therefore held, that the statute, carrying equitable uses into possession in all instances, as well executory powers as any other, would not alter the quality of the estate in that respect; for it might before have been transmitted by devise; and the statute, executing it, would not alter what would have been the character of the estate before that time. I the less reluctantly confess my opinion, because many cases

warrant



warrant it; and one of the clearest and most accurate men, Mr. *Fearne*, has taken it to be the clearest of all cases, that a springing use cannot be devised. It is now decided, that it may (87). But the case here is, whether this is an equitable interest to have a personal fund converted into land: and it bears a close analogy to the case of a contract, which a man has a right to have carried into execution; but if he had no such right, he could not devise it; therefore it is in respect of the antecedent right that he is able to devise, after he has contracted. Here therefore before making the will the last testator *Joseph Tolson Lockyer* had an equity vested in him, by which he might dispose of the future interest; and that would not be revoked or varied by actual possession any more than if he had contracted to purchase before the will, and not carried into execution till after, it would be a revocation.

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(87) Mr. *Fearne*, in his 4th 222, 251. 2 *Bur.* 1131. *Moor* edition, p. 545, appears to have v. *Hawkins*, stated 1 *H. Black.* changed his opinion; and acqui- 33, 4, and *Roe v. Jones*; and ap- esces under the modern deci- proves the grounds of them. sions, *Selwin v. Selwin*, 1 *Black.*

The opinion of the Court being decisively against the heir at law upon the ground, that the will of *Joseph Tolson Lockyer* would reach the subsequent rents and profits, it was unnecessary to enter into any other objection to his title; but it appears to have been liable to some objections of a different nature, and of considerable weight; for first, after the establishment of the will of *Joseph Tolson Lockyer* against the heir by the decision in favour of the devise of a possibility, his claim to such rents and profits as accrued after the death of the testator could not be supported; as in that case from his death whoever received them must have been a trustee for his devisee. Again, it seems impossible on any principle to support the claim of the heir to such rents and profits as accrued after *Joseph Tolson Lockyer* had attained twenty-one; for the direction to lay them out in land, under which alone after the establishment of *Joseph Tolson Lockyer's* will against him he could have any title, extended only to rents and profits to accrue before *Joseph Tolson Lockyer* should attain twenty-one; then how could those received after that period be considered as land; and how could the heir claim them as such? If this is so, it follows, that the heir could have no claim to any part of these rents and profits; for *Joseph Tolson Lockyer* was above twenty-one, when he made his will.



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## BAUGH v. READ.

3 Bro. C. C. 192.

On deficiency of assets marriage portion no satisfaction of a legacy to the wife from her father; the portion being less than the legacy, and having been paid absolutely to the husband upon giving up a certain interest of his wife; the legacy being to the wife for life, remainder to her children and grandchildren, remainder over, and being expressly in satisfaction of another distinct interest of the wife.

No ademption, the intent not being sufficiently plain.

Question, whether testator intended, legatee should give up a legacy under the will of

another testator, or considered it as given up; legatee entitled to both, the intent not being sufficiently made out to compel election.

**WILLIAM MARTIN** by will 1764 gave 10,000*l.* to trustees upon trust to be invested in stock for his daughter *Sarah* for life, then to be divided in equal proportions among her children, but not to vest respectively till each should attain the age of 23; the share of any child, dying under 23, to go equally among the survivors. By the marriage settlement of *James Read* with *Sarah Martin*, *James Read* covenanted to pay 6000*l.* among the children of the marriage subject to his appointment. He had six children living at his death, viz. *James, William, Thomas, Sarah, Mary, and Charlotte*. By his will 1784 he gave his daughter *Mary*, with whom he had before given 4000*l.* upon her marriage with Mr. *Fidell*, 3100*l.* and a fraction, part of his capital stock of 3 per cent. consolidated Bank annuities. To each of his other children, except *James*, he gave 8114*l.* 1*s.* 11*d.* part of the same stock for life, remainder to his or her children and grandchildren, and, for default of children and grandchildren living at his or her death, remainder to his other children equally. To *James* he gave no specific legacy, but made him his executor and residuary legatee. The will recited testator's marriage settlement, and declared these benefits given to the children by the will to be in full satisfaction of the obligation, testator was under to them by the covenant in that settlement. In 1785 upon the marriage of *Charlotte* with Mr. *Baugh* the testator transferred 5000*l.* part of the same stock to the husband absolutely for his own use and benefit. *Sarah* married Mr. *Jones* after the death of her father, which happened November 1785. When his sons *James* and *William* attained the age of 23, he having settled them in business took transfers from them of their respective sixth shares of their grandfather *Martin's* legacy, each amounting to 1800*l.* 18*s.* 1*d.* 3 per cent. consolidated Bank annuities. In the settlement of Mrs. *Baugh*, who was an infant, when she married, there was a stipulation, that she and her husband should transfer her share to her father, when

when she should become entitled to it; but if she should die before 23 so as never to become entitled to it, her husband should not refund any part of the portion. Mrs. *Baugh's* share was transferred accordingly. The share of Mrs. *Fidell* was transferred in the same manner, either on her marriage, or as soon afterwards as she became entitled to it. The transfers of *William* and *Charlotte* took place after the will; those of the other children, who transferred, before it. On the 8th of *February*, 1784, *Sarah* executed a power of attorney to her father's Bankers in *London*, empowering them to accept her share of that stock (which had been transferred, but not accepted) to receive dividends, and to transfer; but no transfer was ever made under this power. There was no dispute as to *Thomas's* right both to the legacy given by his grandfather, and to that given by his father, as the father died, before he was capable of making a transfer. Testator at his death was not possessed of so much stock, as he had devised, by a considerable deficiency. The bill was by *Baugh* and his wife against the executor, claiming the legacy under her father's will; there were three questions; first, whether the portion given with Mrs. *Baugh* was to be considered as a satisfaction, or an ademption of the legacy *pro tanto*; secondly, whether these legacies were specific or not (which was given up by Plaintiff without argument). Thirdly, whether Mrs. *Jones's* share under her grandfather's will ought not to be considered in this Court as actually transferred to the testator, or at least whether he did not consider it as transferred, and as part of his property, so as to put her to her election,

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The late *Master of the Rolls* (88) sitting for the *Lord Chancellor* directed the accounts, and an inquiry into the last point, which the *Master* reported against Defendant *Jones*. Exceptions were taken to the report, and another question was made as to the propriety of admitting parol evidence, upon which the report was grounded. The cause came on upon the report, and for farther directions.

Mr. *Mitford* and Mr. *Richards*, for Defendant *Jones*.

Parol evidence cannot be admitted to shew, testator considered

(88) Sir *Lloyd Kenyon*.

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dered this sum as part of his own property. There is no ambiguity in this will. Does the circumstance of his not having so much stock give an opening to any sort of evidence? The evidence is offered to shew, he meant to include other stock than his own; there is no case for that. Where a man was in possession of a * freehold estate in fee simple, and was also tenant in tail under an old settlement, the entail having never been barred; upon a devise of all his freehold estate your Lordship refused parol evidence to shew, he meant to include the estate tail.

Lord CHANCELLOR.

Latent ambiguity arises *dehors* the will, and evidence is admissible to explain it; as in case of two manors of the same name, or an inadequate description of a child: not to explain a patent ambiguity upon the face of the will.

The ambiguity can only arise, where the will fails of expression. If it arises *dehors* the will, it is a latent ambiguity, and evidence may be added to explain it (89); otherwise, if it is a patent ambiguity, appearing upon the face of the will itself. In the first of all the cases upon the subject concerning the Manor of *Dale*, there being two of that name, evidence may be given to shew, it is applicable to one or the other; then to shew, to which; so where there is an inadequate description of a child, it is admitted to shew, what is an adequate description of it; then see, whether that corresponds with the rest of the will.

Mr. Mitford.

In one of those cases there were two things answering the description, in the other nothing; here there is only one. In *Andrews v. Emmot*, 2 Bro. Ch. Ca. 297, testator gave several legacies, and his personal estate was insufficient; he had a power of disposition over a considerable sum, and might have conceived, that that sum was part of his personal estate: but your Lordship refused evidence of that intention.

Mr. Lloyd, for the Executor.

There are cases, where the Court has proceeded upon circumstances such as these; and put parties to their election. As, if testator's property is not sufficient to answer all the purposes of the will, they have considered that circumstance as evidence

(89) Post, *Parsons v. Parsons*, 226, and the note, in p. 267; and in *Nourse v. Finch*, 357. Vol. VI, 397.

evidence of his intention; and would not let parties, such as these, disappoint the other legatees; as, where a man devised an estate to another, subject to several rent charges; and among the rest one to his wife, without saying, whether it should be in bar of dower or not; she would have both, if the estate was sufficient; if not, she must elect (90). *Pearson v. Pearson*, 1 Bro. Ch. Ca. 292.

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Solicitor General cited *Fonnereau v. Poyntz*, 1 Bro. Ch. Ca. 572, for admitting the evidence.

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The difficulty of the case is, that here testator has described this stock as being his property then existing as such a fund; it turns out, that, if this is not added, the testator has no such property; and therefore creates, what the law calls, a latent ambiguity; and induces a right of proving, what he did mean by a description, insensible without that proof. A will is ambulatory; but a specific bequest is fixed as much as a devise of land. Suppose, he had recited, that he had so much in the funds,

Will is ambulatory; but a specific bequest is fixed as much as a devise of land.

(90) 1 Ves. 230, 3d edition, note. The doctrine of presumed satisfaction, adopted from the Civil Law, has been of late much discountenanced; and the Courts are anxious to exempt from its operation cases, where circumstances, affording grounds of distinction, occur: *Forsight v. Grant*, post, 298. In the case of dower, it is now settled, *French v. Davies*; *Strachan v. Sutton*; *Greator v. Cary*, post, Vol. II, 572; III, 249; IV, 391; VI, 615; *Lord Dorchester v. Earl of Effingham*, Coop. 319; upon full consideration of all the preceding cases, that, to put the widow to her election by a provision under the will of her husband, her claim of dower must be incon-

sistent with the will. Circumstances have been admitted to repel the presumption even in the case of children; which is considered most favourable to the inference of an intention only to fulfil the parental obligation by another mode, especially if accounted for by an alteration in the circumstances of the child, as by marriage or other advancement, rather than capriciously to double the fortune of one child, making a very unequal distribution without a reasonable motive: *Hinchcliffe v. Hinchcliffe*; *Sparkes v. Caton*, post, Vol. III, 516, 530, and the references in *Ellison v. Cookson*, ante, 100, and the note in page 112.

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funds, which he really had not, and that he bequeathed and divided that sum; would not that fact of his not having it be proper evidence to be admitted to shew it to be an imperfect description? And if so, other evidence must be admitted to shew, what the thing was, that he did mean to give. Where a testator uses certain words, which *primâ facie* give a clear account, the same fact that enables you to prove, that there is a latent ambiguity, enables you to prove, what was his intention (91).

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The point was not determined, but the evidence was agreed to be admitted then without prejudice.

The other evidence, besides the letter of attorney, was the depositions of *Eastcote*, one of the Bankers, as to a conversation between him and Mrs. *Jones*, previous to testator's death; in which she said, she had or would transfer her share to her father.

*Solicitor General* and Mr. *King*, for Plaintiff: Upon the first question.

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This is no satisfaction. The portion was advanced to the husband for his absolute use; but the legacy was under particular limitations, to her for life, remainder to her children and grandchildren, and for default of those among testator's other children; which limitations will be disappointed, if this is considered \* as a satisfaction. The question must be determined entirely upon the instruments themselves. In order to be a satisfaction the objects ought to be not only similar, but equally beneficial; here it is not so; for it is money given into the pocket of the husband, and cannot be applicable to the purposes, to which these funds were to be applied.

Upon the third question.

The warrant of attorney was an agreement by Mrs. *Jones* to transfer. She did at least by the power, which she executed,

(91) Parol evidence admitted 2 Bro. C. C. 87. Post, *Parsons v.* to explain a will, where doubtful, *Parsons*, 266. *Selwood v. Mild-* not to contradict: *Hampshire v. may*, Vol. III, 306. *Price v.* *Pierce*, 2 Ves. 216. 1 Ves. 231, n. *Page*, IV, 680. *Smith v. Coney*, 3d edit. *Williams v. Williams*, VI, 42.

cuted, give her father reason to suppose, he had such an interest in this, that he might transfer it; and she shall not be allowed to put this sum in her pocket; which will make a deficiency in the other legacies, if she takes it out of the fund, and comes in with the rest of her legacy.

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Mr. *Mansfield*, Mr. *Lloyd*, Mr. *Stanley*, and Mr. *Pemberton*, for the Executor.

This is a case, in which the Court will lean against the demand as much as possible; because this is certainly a case of a double portion. The Executor has no specific legacy, but is only entitled to the surplus: but there will be no surplus, on the contrary a considerable deficiency, if these claims are established. He has expressly made the legacy a satisfaction of the covenant. *Hartop v. Whitmore*, 1 *P. Will.* 681. *Warren v. Warren*, *Ellison v. Cookson* (92). It appears, testator looked upon that sum as his property. There is sufficient for us to shew (*concessit curia*). He took this transfer from four of his children (93).

Mr. *Mitford* and Mr. *Richards*, for Defendant *Jones*.

Testator intended, Mrs. *Jones* should have both the legacies, under *Martin's* will and his own. He did not at the time of making his will understand, that he was in possession of this sum, or form his will upon the ground of coming into possession of it. If evidence is to be admitted, it must be of a direct contract between the testator and his daughter, one requesting, \* the other granting, the transfer; but here is no actual evidence of the fact of the transfer, no evidence to guide the discretion of the Court upon this subject. It is imputing a very improper intention to the father to wish to take this from his daughter, for whom, it appears, he had great fondness.

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(92) Ante, 100, and 3 *Bro. Ch. Ca.* 61. tomary, to leave it one day, neglected, or forgot, to call

(93) The transfer by Mrs. *Jones* again. This was not relied upon; being supported only by who took the letter of attorney the evidence of the son; who in order to have the transfer was objected to as interested. made, being obliged, as is cus-

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 BAUGH
 v.
 READ.

fondness (94). He took an assignment from his eldest son *James Read*, but he gave him a considerable sum of money, and set him up in trade; so he advanced money to and set up in business *William*, and made his transfer when 23 the condition. So there was a consideration both to Mrs. *Baugh* and Mrs. *Fidell*. *Thomas* is not to part with his interest, because he has no consideration for it. His general intent was, that none of his children should give it up, unless for valuable consideration, which must apply to Mrs. *Jones*. He intended to make all these children equal; for this purpose he has been very minute in his bequests, even to small fractions. He meant to give each of them 10,000*l.* stock. With this view he made a provision for Mrs. *Fidell*, calculated upon what he had before given her, viz. 4000*l.* and gave her 3100*l.* and a fraction, which, stocks being then at 58, would be just sufficient to purchase 10,000*l.* in the 3 *per cent.*; so would the legacy given by his will, together with the sum given by the grandfather: and no reason appears, why he should make any difference between them, but his letters prove the contrary. The evidence principally relied on is this letter of attorney; there was no direction given to the agents to transfer this stock. It was simply a power to accept stock, receive dividends, and transfer. It was necessary for the former purpose, because, though transferred to her, she had never accepted, and was too ill to go for that purpose, or to receive dividends; and nothing is more usual than to insert a power to transfer to be ready upon sending any particular instruction; it is by no means so uncommon, as the Master's report has suggested. Mr. *Eastcote*, one of the Bankers, in his depositions says, that this conversation happened previously to the testator's death, but he does not recollect the time, which might be very material. Testator had in his mind the stock, as increased by the several sums transferred by his children: but this share was not mentioned in the account transmitted to him by the Bankers. If he understood, that she had transferred this, would not he have said, he should be credited for a larger sum of stock, upon account of her share? but his making no inquiry is explained by this circumstance, that she was at her brother's

(94) His letters were read to prove this, expressing sorrow for her bad state of health, &c.

brother's house in a bad state of health, and therefore he imagined, she received dividends, though in fact they were not received by any one for some time before his death, since which the executor has received them.

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READ.

Entries were read from the books of the testator and the Bankers to shew, that he was credited with the increased sums of stock upon the several transfers made by his children; and that he never was credited with this share of *Sarah*; and letters were read shewing his anxiety to have the transfer of his son *William*'s share completed, but in which there was no notice taken of *Sarah*'s.

Lord CHANCELLOR.

The thing, I doubt upon, is this. This is a specific legacy. The testator takes notice, that he has, or fancies that he has, a specific sum in stock, capable of such distribution as he has made of it. Shares of 8000*l.* &c. are the distinct shares, he proposes to give that specific sum. Upon the marriage of his daughter he transfers part of that specific sum, so mentioned in his will, I agree, to different uses; yet I doubt whether, though not to the same uses, it will not operate as an ademption, if not a satisfaction, being given as advancement of marriage.

Solicitor General, in reply.

Unless for that purpose there is no pretence to say, this is a satisfaction. It was out of the whole aggregate he had, not a specific fund. He takes notice of this covenant, and seems to have been aware of the demand upon the estate of *Martin*, and negotiates with them with respect to that demand. By his will he proposes to become purchaser of their interests in the 6000*l.* Mrs. *Baugh* was entitled to a share of that, subject to his appointment; and he states, that the legacy is to exclude her from any part of that. Afterwards upon the marriage the portion was advanced; and there is positive stipulation in the settlement, that she and her husband should transfer the share under *Martin*'s will, when entitled to it. This fact was looked to, that she might die before 23, and by that

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READ.

that accident he might not become purchaser of that; and he has expressly said in the settlement, that though he means to have this share, if he can, in consideration of the portion, yet the husband is not to return any part of it, in case by her death before 23 he shall be disappointed. If the father had died within a week after making this will, Mrs. *Baugh* would have a much larger provision than Mrs. *Fidell*, and reasonably; because Mr. *Baugh* settled 20,000*l.* upon the marriage, Mr. *Fidell* only 5000*l.* This is a case, where the will professes upon the face of it to be a satisfaction for one demand, the portion for another. When he made his will, he was looking to, what he had advanced Mrs. *Fidell*, and insisted upon retaining, what he took from her; but he did not treat so with Mrs. *Baugh*, whose husband made a much larger settlement upon her. The advancement of different portions shews, he meant to treat them differently. In no case has the Court said, a sum of money, given by a will in satisfaction of one sum, shall be adeemed by a sum of money agreed to be advanced upon contract to purchase another sum; the Court cannot go upon such loose principles. If the party states his intention, the Court will act upon what, he states. They cannot say, this is a satisfaction; for that purpose they must say, that though he gave his legacy in lieu of the interest in the 6000*l.* and though, if he had died immediately, she should have taken that legacy, and also the legacy under *Martin's* will; yet that his kindness for her grew less at the time of her marriage without any reason for it, and therefore she must lose that sum. There is no cause to say, the persons in remainder are to be considered as satisfied as to their proportions of the fund left. Though her life estate was to go in satisfaction of her interest in the 6000*l.*; there is no reason to say, he meant them to take nothing. Suppose her children and grandchildren had been dead, Mrs. *Fidell* would have had a right to say, he gave her a contingent interest in that legacy to Mrs. *Baugh*; so would the other brothers and sisters; and particularly *James Read*, who had no specific stock, except a contingent interest in the shares of his brothers and sisters, who should die without children. It would be very harsh, that they should be cut off, because she got 5000*l.* upon her marriage; that advancement cannot satisfy his intention of kindness to all her children,

children, grandchildren, and his other children. So if the limitation over had been to me, it would be the same.

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Lord CHANCELLOR.

It cannot apply in the shape of a satisfaction; and, unless made out to be done with intention to adeem, it is nothing at all. Supposing this 8000*l.* to be a proportion of a certain sum standing in testator's name, and that he distinguished the whole by shares of 8000*l.*; and that he had done, what you argue, fairly; *i. e.* given by will to *A.* for life, remainder to a stranger without any intermediate limitation for the sake of the children; and had upon the marriage of his daughter applied part of that sum; is it not evidence of an intention to adeem without satisfying? Here the ground rather fails; as it is not certain, that he thought, he was distributing a certain sum.

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Solicitor General.

Advancement of part out of the whole is not evidence, that he meant to destroy my legacy more than those of the other persons. The true inference is, that he means to prejudice all equally, rather than one only, merely because he says, he means to prejudice somebody. As to the other question, there is no pretence for a consideration for the letter of attorney; and *Thomas*, by the accident of his father's death before he attained twenty-three, has got a larger provision. This power of attorney is not such, as is represented; such as a man would send to his banker; the power was only necessary to accept and receive the dividends. This stock was transferred to her in *August*, 1783; and the power of attorney was in *February*, 1784. In the entries of the books *Mrs. Fidell's* share, even after it had been transferred to him, is called *Mary's*.

Lord CHANCELLOR.

It is impossible to say, this is either a satisfaction or an ademption. It is not express enough. I think, the father intended to give this right to a sum, expected to accumulate before his death by the addition of all those sums, at least, if not of others; therefore it does not come up to that point, which I should have thought it reached, and perhaps have been wrong in so thinking, if it had been a certain sum distributed

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v.
BEAD.

buted in certain proportions. Upon the other point, if I was to indulge conjecture, I think, he meant to get in all those sums, and in this shape of 3 *per cents.*; but the evidence is not sufficient in my opinion. It must go back to the Master; and take it, that by consent it was agreed to consider the evidence taken before the Master as evidence in the cause.

Costs given. Costs out of the general estate.

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1791.

Feb. 3d.

Purchaser not permitted to apply part of his purchase-money in discharge of a mortgage on the estate, though some of the parties consented, others being infants; and, that there was such an incumbrance, not appearing on the report. *Quære*,

SOLICITOR GENERAL moved, that a purchaser should be at liberty to apply part of his purchase-money in discharge of a mortgage upon the estate. Some of the parties, who were competent, consented: Some were infants.

Lord CHANCELLOR

Asked, if it appeared upon the report, that there was such an incumbrance; and, being answered in the negative, said, he doubted, whether it could be done even by consent; because there was nothing to shew the Court, that there was such incumbrance: though perhaps, if the parties were all competent to consent, and did consent, it might be done.

Upon this *Solicitor General* moved to pay the whole purchase-money into Court.

could it be done, if all were competent, and consented?

1791.

Feb. 8th.

Annuity bequeathed to testator's brother *Edward* for life, remainder to his

PARSONS v. PARSONS.

TESTATOR by will created a trust to pay an annuity of 75*l.* to his brother *Edward Parsons* for life, and after his decease to go equally among his children by his present wife. At the time of making this will he had no brother living except

children by his present wife. At date of the will he and his wife were dead; and their children had other legacies under it; and testator had only one brother, *Samuel*, having a wife and children, whom he had been in the habit of calling *Edward* and *Ned*. His children held to be entitled upon these circumstances.

cept *Samuel Parsons*; who had a wife and children: but four or five years before he had a brother named *Edward Parsons*; but he and his wife were dead at the date of the will; and other legacies were given by it to his children. Testator had been in the habit of calling his brother *Samuel* by the name of *Edward* and *Ned*. The bill was brought by the children of *Samuel* against the trustees; and upon these circumstances, which were proved and admitted, the only question was, whether testator intended his brother *Samuel*, when he named his brother *Edward*.

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Upon all these circumstances decreed an account according to the prayer of the bill without argument (95).

(95) Legacy good; though both Christian and surname of legatee mistaken: *Beaumont v. Fell*, 2 P. Will. 141. Parol evidence not admitted to fill up a blank in a will: 2 Ch. Ca. 51. *Baylis v. Attorney General*, 2 Atk. 239. *Hunt v. Hort*, 3 Bro. C. C. 311; though it is to explain a nickname; or where there are two persons of the same name: *Baylis v. Attorney General*, 2 Atk. 239. See 3 Woodes. 328. Ante, 259. Post, 357. *Delmare v. Robello*, 412. *Standen v. Standen*, Vol. II, 589. *Abbot v. Massie*, *Selwood v. Mildmay*, *Campbell v. French*, *Clarke v. Norris*, III, 148, 306, 321, 362. *Chambers v. Minchin*, *Price v. Page*, IV, 675, 680. *Smith v. Coney*, VI, 42, 397. *Holmes v. Custance*, XII, 279. XV, 514. *Herbert v. Reid*, XVI, 481. *Rylott v. Walter*, 17th February, 1802, at the Rolls. A residuary bequest to testator's seven nieces, naming them. One was called in the will *Mary Webb*; but it was admitted

in the answers, that *Sarah Webb* was intended; and there were but seven, including her. He had another niece named *Mary*; who was dead: but the answers admitted, that he knew of her death; and it was suggested at the hearing, that her name was *Mary Brydges*. The answers also clearly admitted the mistake. Decreed, that *Sarah Webb* was entitled. Some of the cases above mentioned were cited; and *Garth v. Meyrick*, 1 Bro. C. C. 30. *Campbell v. French*, post, Vol. III, 321, and *Janjenson v. Richards*, before Lord Thurlow, from a MS. of Mr. Romilly. See also, post, *Garvey v. Hibbert*, *Stockdale v. Bushby*, *Careless v. Careless*, XIX, 125, 381, 601. *Coop.* 229. 1 Mer. 384. *Chambers v. Brailsford*, post, XVIII, 368. XIX, 652. 2 Mer. 25. *Thomas v. Thomas*, 6 T. R. 671. So a legacy by a mistaken description established: *Gallini v. Noble*, 3 Mer. 691.

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EARL OF SCARBOROUGH *v.* PARKER.*Feb. 8th.*

Defendant,
stating himself
trustee for
mortgagees,
decreed to de-
liver up deeds,
because he did
not name them;
so that Plain-
tiff could
amend.

BILL to have title-deeds delivered up. Defendant in his answer stated, that he was trustee for children's portions to the amount of 20,000*l.* and for mortgagees generally without naming them: He admitted, that Plaintiff had a right to have some of the deeds delivered up; and by his Counsel only desired an inquiry as to what deeds.

Mr. Mansfield, for Plaintiff.

The portions have been paid long ago. Defendant was the agent; and admits, that the deeds are relative to the Plaintiff's estate.

Lord CHANCELLOR.

Costs given.

It is no answer at all. If he was trustee for mortgagees, he ought to name them, so as to enable Plaintiff to amend the bill; which he cannot do now. Therefore he must be decreed to deliver up the deeds, and pay the costs (96).

(96) See *Mr. Beames's* observation on this decision, *Bea. Costs*, 151.

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1791.


COLLET *v.* LAWRENCE.*Feb. 8th.*

Testator be-
queathed to
his wife the
lease of his

WILKINSON in 1779 bequeathed to his wife the lease of his house, and all his household furniture, plate, linen, &c. Then he gave her the interest of all the money, he should die possessed

house and all the furniture, &c. then for life the interest of all money he should die possessed of: then half of the debts due to him at his death, (one excepted, which he directed debtor to retain as long as he pleased, paying the interest to her) to be disposed of as she thought fit. In case the interest of the money, he should die worth, should not be sufficient for her maintenance, executors to allow part of principal out of the debts, except that before excepted, to make her life easy and comfortable. After her death the interest of all money remaining to his sister; after her death to her daughter all sums remaining for ever; if they die before his wife one half of all sums remaining to be disposed as his wife should think fit, the other to *A*. Upon bill by testator's niece against executors of the wife the niece held entitled to all beyond the debts and a moiety of all debts but that excepted: the other moiety to wife's executors, who, being also executors of testator, were decreed to take out of wife's share a sum advanced under their power.


possessed of, for life. Then he farther gave her one half of the money, which should be due to him at his death, to be disposed of as she should think proper; except a sum in the hands of *Nelson*, which, he desired, should be continued in his hands, as long as he pleased, he paying the interest to Mrs. *Wilkinson*. He then directed, that in case the interest of the money, he should die worth, should not be sufficient for the maintenance of his wife, his executors were to allow part of the principal out of what should be due to him, except what was in the hands of *Nelson*, to be applied to make her life easy and comfortable. He gave to his sister *Eleanor Nelson* after the death of his wife the interest of all his money remaining; and after her death to her daughter *Ann Nelson*, afterwards married to *Collet*, all sums of money remaining, for her sole use for ever: and in case of their decease before the death of his wife he directed one half of all sums remaining to be disposed of, as his wife should think proper; the other half to the daughter of *John Wilkinson*. He then appointed executors *in trust for the above*, to claim and receive all sums of money due to him; and gave each of them a legacy of 10*l*. Testator died 1786. The executors had advanced to the widow, according to the power they had, 96*l*. to enable her to pay some debts of her own. After her death the bill was brought by Mrs. *Collet*, against the representatives of the widow, who were also representatives of the testator, for an account of his personal estate; and to have the interests of the parties under the will settled; insisting, that the widow had no power to dispose of more, than was specifically given to her. The Defendants contended, that she was entitled not only to the interest of all the property during her life, but also to the disposition of a moiety of what was due to him at his death, except the sum in the hands of *Nelson*.

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 v.
 LAWRENCE.

Mr. *Mitford* and Mr. *Richards*, for Plaintiff.

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It is impossible to give sense to the will according to Defendant's construction: for by that the ambiguous words cannot be reconciled with the latter dispositions: otherwise they may. Testator by giving her the interest for life shewed an intention, that she was only to have an income; and then Defendant's construction is absurd; because it would be giving her the interest

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rest of the whole for life, and one half absolutely. But his intent is clear from the passage permitting the executors, if the interest is not sufficient for her maintenance, to advance at their discretion out of the principal what they may think necessary for that purpose. This shews, he meant to keep the principal one fund, not to be disposed of during her life. The trust to the executors extends to the whole: so does the language, where he says, "*the money due to me,*" and "*in case the interest of the money, I die worth, is not sufficient, &c.*" those phrases include the whole. Here therefore appears a clear intention, that the principal, except what should be so advanced, should remain. Then the disposition over of so much, as remains at her death, must mean so much, as remains, in case the executors shall advance any thing; and they have advanced. The disposition in the event of the death of the devisees over before that of the wife also applies to the whole fund. The latter words of a will must control the former. The construction then is, that he gave her the interest of all, besides the specific legacies; so much, as the executors should not reduce in the manner pointed out, to remain for the benefit of his sister and niece: and to his wife one half of the principal in the event particularly described only.

Lord CHANCELLOR (without hearing Counsel for Defendant.)

An express immediate disposition in a will not controlled by subsequent inference.

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Some effect must be given to every part of a will.

He gave her a moiety of what should be due to him, exclusive of what was in the hands of *Nelson*, immediately upon his death. That immediate disposition seems to exclude the inference, arising from the power of the executors and the question, whether the last clause is not an exposition of that general one. Another thing is, he gave her the interest for life of all the money, he should possessed of, and farther one half of the money due to him at his death, exclusively of the sum in the hands of *Nelson*: but the moiety, he afterwards gave her, was * of the whole; which does not apply *ad idem*: and I must give some effect to every part of the will (97). If so, the other clauses will be residuary. The only question then is, whether I can apply the other clauses to it; and I do not think, they will apply. I do not think, the latter words

are

(97) Post, Vol. XIX, 654, 664.

are inconsistent. The difficulty is how to force the sense of general words against the express directions of that clause, unless it can be controlled by the apt application of other parts. It is a different bequest of one moiety. I think, the Plaintiff's construction would be going too far. The Plaintiff is entitled to the whole beyond the debts, and to a moiety of the debts. Therefore let an account be taken to see the amount of the debts due to testator at his death above the sum in the hands of *Nelson*: and declare the Defendants, executors of *Mrs. Wilkinson*, entitled to a moiety: the other to remain as part of the estate of testator; and to be laid out in 3 *per cents.* for *Eleanor* for life, with liberty to apply. Whatsoever was advanced by the executors to the widow shall be out of her share. Her executors, who are also executors of testator, may take that out of the moiety, which became hers to dispose of.

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COLLET
v.
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IN THE EXCHEQUER.

| | |
|-----------|---------------------|
| EYRE, | <i>Chief Baron.</i> |
| HOTHAM, | } <i>Barons.</i> |
| PERRYIN, | |
| THOMPSON, | |

BULL v. VARDY.

1791.
Feb. 10th.

THIS cause stood for judgment. Lord Chief Baron *Eyre* stated the case; and delivered the judgment of the Court. Testator devised to his wife several houses; to his sisters

his money in securities for their lives; then divided his fortune in small legacies, but the legatees to take nothing till the death of his wife and sisters; and made residuary legatees: Under the following clause, "I empower my wife to give away at her death 1000*l.* to *A.* and *B.* 100*l.* each, "the rest to be disposed of by her will" there is no absolute legacy, but a naked power to the wife; who being dead without any disposition, the objects specified are not entitled. Devise of absolute interest to one with any expression, that he shall dispose of the whole or part of *A.*, not properly a devise, but a trust for *A.*, which Court will execute after death of the first devisee. Devise to one for life or absolutely with directions that he shall dispose of it to another at his death operates as an immediate devise without any such disposition.

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The testator devised to his wife several houses; but did not give her any interest in the general produce of his estate. He then goes on thus. "I farther empower my wife to give away at her death 1000*l.*; 100*l.* of it to *Elizabeth Turner*; 100*l.* to Mrs. *Bennet*; the other 800*l.* to be disposed of by her by *will." Then he gave to his two sisters for their lives his ready money in the funds and other securities; and he anxiously repeats, that his legatees are to take nothing till after the death of his wife and two sisters; but nothing more was given to the wife, than what I have mentioned. He then divides his fortune into small legacies, upon which nothing arises; and gave the residue to two young women, named *Crowe*. The wife died without making any disposition of the whole of this 1000*l.* or any part of it. The bill is against her executor; claiming the 100*l.* which she had the power to leave to *Elizabeth Turner*. The question arises upon the particular words stated, together with the observation upon the other parts of the will, that no more was given to the wife, than by the first words. It was insisted for Plaintiff, that the 100*l.* which the wife was empowered to give, was sufficiently devised by this will: and argued, that expressions, importing recommendation, desire, request, &c. like the words in the *Roman* law, *peto*, *rogo*, *fidei committo*, &c. are in their nature, at least in a will, compulsory, and words of devise: therefore when testator empowered his wife to give to a certain object a certain sum, that is a legacy. Many cases were cited as authorities for this; from 2 *Vern.* 153, down to *Wynne v. Hawkins*, 1 *Bro. Ch. Ca.* 179. The clear result of all is, that where the absolute interest is given to one with any expression, that the devisee shall dispose of the whole, or a part, to a particular person, that does not amount to a devise properly; but will raise a trust for that person, which the Court will execute after the death of the devisee. For Defendant it was truly observed, that this doctrine could not affect the present case; because the wife had not only no absolute interest in the 100*l.* but none at all: so there is nothing to raise a trust. The devise therefore to her is merely a naked authority, which the principle of these cases does not touch. From some of those cases this doctrine also arises, which is nearer to the present case; that a devise to one for life or absolutely upon the face of it, with directions that he shall dispose of it to another at his

his death, shall operate as an immediate devise without any such disposition. In arguing the case in 2 *Vern.* 467, it seems to be admitted, that a devise to one for life, with directions that at his decease it shall go to *J. S.*, is an interest for life to the first devisee, remainder over. Here testator empowers his wife to give 1000*l.* The word "*empower*" must be understood to be imperative, as the only possible medium to make *it the testator's own bequest. If it can be so considered, the testator may be considered as doing that, which he compels another to do: and in a will, where the intent is every thing, it may operate without the assistance of the instrument. But can it be considered from the word "*empower*" that he intended *Elizabeth Turner* and *Mrs. Bennet* to have each 100*l.* after the death of the wife at all events? As to the 800*l.*; it cannot be said, he devised that sum; because no object was marked out by him. Unless she selects objects, that devise cannot take effect. As to the persons named; if his intention was, that they should at all events take; why devise to them differently from all his other pecuniary legacies? The plain import of the words with the context seems to be this; he gives the residue to those women named *Crowe*: but says, his wife may dispose of 1000*l.* if she pleases: if she does, she must give 100*l.* to each of these women; the rest as she pleases. The word "*empower*" in its most obvious sense is unfit to create a charge. The party must execute the power to create a charge. It was not argued, that, if it was the case of a power, the Court could do any thing to execute it. Upon the whole we are of opinion, Plaintiff is not entitled to this sum of 100*l.* and that the bill must be dismissed (98).

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A power must be executed, in order to create a charge.

(98) See *Harding v. Glyn*, *Taylor v. George*, 2 *Ves. & Bea.* 1 *Atk.* 460, and the cases in 373. *Birch v. Wade*, 3 *Ves. & Bea.* 198. *Forbes v. Ball*, 3 *Mer.* *v. Keighley*, Vol. II, 333, 520. 437. *Kirkbank v. Hudson*, 7 *Price*, *Pushman v. Filliter*, III, 7. 212. *Prevost v. Clarke*, 2 *Madd.* *Brown v. Higgs*, IV, 708. V, 458. *Eade v. Eade*, 5 *Madd.* 118. 495, 561. VII, 86. VIII, 380. *Horwood v. West*, 1 *Sim. & Stu.* *Cruwys v. Colman*, IX, 319. X, 387. Testator expressing, that 536. *Wright v. Athyns*, XVII, something is to done, which he 255. XIX, 299. *Coop.* 111. has a right to order, is to be 1 *Turner's Rep.* 243. XVIII, 41. taken as speaking imperatively *Parsons v. Baker*, XVIII, 476. not by way of recital; *Sandford Tibbits v. Tibbits*, XIX, 656. *v. Raikes*, 1 *Mer.* 646.

IN THE EXCHEQUER.

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Feb. 10th.

GRAHAM v. GRAHAM.

Devisee for life of a rent-charge out of an estate, devised in strict settlement, assigned it to creditors as a collateral security.

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Tenant for life with intent to redeem it for the annuitant gave bonds to the creditors on condition of giving up their securities to annuitant to be cancelled. Executors of obligor paid all the bonds but one; which they disputed; because, though delivered by obligor to a third person for creditor, when he should agree it was not accepted till af-

THIS cause stood for judgment. Lord Chief Baron *Eyre* stated the case; and delivered the judgment of the Court.

This is a bill, claiming an annuity or rent-charge of 100*l.* a year and some arrears against Sir *James Graham*, tenant in possession of the estate, against the surviving executors of Doctor *Robert Graham*, a former tenant of the estate; and against Mr. *Booth*, heir of the surviving trustee under the will of Lady *W.* the deviser of the annuity to the Plaintiff *Charles Graham*. The prayer of the bill is for an account, of what is due to the *Plaintiff for arrears of the annuity to the time of the death of Doctor *Graham*, to be answered by his executors out of his assets; and for the arrears due since his death, to be answered by Sir *James Graham*; and to have a receiver appointed; and the growing payments secured to the Plaintiff; and that *Booth* may join, if necessary, to establish the will of Lady *W.* The state of the case is this. Both the Plaintiff and Doctor *Graham* were nearly related to Lady *W.*; the former being the son of her elder brother; the latter the son of her younger brother. She died in 1757: and gave the bulk of her fortune to Doctor *Graham*, and to the Plaintiff the annuity in question. By her will, dated 1757, she devised her estate to trustees to settle to uses: and among the rest to the intent to issue the annuity to the Plaintiff for life; and subject thereto to settle it upon Doctor *Graham* in strict settlement, with remainders over. Doctor *Graham* was suffered to take possession upon her death; and kept on terms of friendship with the Plaintiff; and often gave him assistance, which he often wanted. In 1769 Plaintiff had contracted debts to the

ter death of obligor. This bond was recovered upon at law. Annuitant entitled as against the executors to the annuity disencumbered; but not to arrears incurred in life of obligor; and as against tenant of the estate, to arrears since the death of obligor: but future payments left to agreement, as heir at law of deviser of the annuity not being party, execution of the trusts of the will could not be decreed.

the large amount of 5000*l*. He had granted several annuities; and had made this annuity, devised to him, a collateral security. In particular he sold one annuity of 60*l*. a year to *Champion* secured by bond in the penal sum of 840*l*.; and farther secured by this annuity given by Lady *W.*'s will. He afterwards sold other annuities to *Champion*, who assigned his securities to *Curtis* at *Bristol*. By Mr. *Hamersley*'s evidence it appears, that Doctor *Graham*, who died in 1781, had expressed a desire to have a statement of the Plaintiff's affairs made out in order to think of some plan for his relief. A statement was accordingly prepared; and it appeared, that he had granted out 540*l*. a year in annuities; and that arrears were due upon those annuities; and that he owed besides 1000*l*. upon simple contract. Doctor *Graham* was informed of this; and that the annuity devised by Lady *W.* was a collateral security for those annuities. He said, he could not advance money enough to pay them; and then proposed to give his bond for the principal sums, for which the annuities were granted, payable with interest at his death; if they would give up to the Plaintiff the several securities, they had, to be cancelled. Doctor *Graham* also proposed to pay off the simple-contract debts by bills to be drawn upon, and to be accepted by, him. As to the arrears of Plaintiff's annuities, he did not undertake to pay them; but Plaintiff was to endeavour to settle them in the best manner he *could. All the creditors except *Curtis* agreed to the proposal: and were contented to take the Plaintiff's bond for the arrears. *Hamersley* says, he applied to *Wallace*, agent for *Curtis*; who gave no direct answer. *Hamersley* got the bonds prepared; and among them one to *Curtis*. On the 9th of *March*, 1781, Doctor *Graham* executed the bonds; which were left with *Hamersley*: and accepted draughts to the amount of 1000*l*. *Hamersley* says, he delivered the bonds to the annuitants; and they delivered up their securities, and particularly the assignment of the annuity given to the Plaintiff by the will of Lady *W.*, to be cancelled; and that he left the bond to *Curtis* with *Wallace*, his agent, to be delivered to him when he should agree to accept it. Doctor *Graham* died, before *Curtis* accepted it; which he did afterwards; and the bond was afterwards delivered to him. Doctor *Graham*'s executors paid off the other bonds;

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bonds; but made a difficulty as to that to *Curtis*; unless he would deliver up his security to them, instead of delivering it up to the Plaintiff to be cancelled. A purchaser of *Curtis's* interest sued and recovered upon Doctor *Graham's* bond. *Hamersley* applied to one of the executors; and says, he satisfied him, that the securities were to be cancelled; and that the executor said, he would write to the steward to pay the arrears then due; and proposed that the annuity should be assigned to *Hamersley* to be preserved for the Plaintiff, *Hamersley* says, that Doctor *Graham* never expressed any other object than to relieve the Plaintiff, and exonerate the rent-charge. It was insisted for Defendants, that the rent-charge, having been redeemed with Doctor *Graham's* money, was to be considered as redeemed for the benefit of the estate: and that the executors of Doctor *Graham* are entitled in equity to the benefit of these securities, as representing creditors having accepted Doctor *Graham's* bond as a satisfaction for their debts; and are to be redeemed before the Plaintiff's demand: and as to *Curtis's* interest, that Doctor *Graham's* bond was deposited with *Hamersley* as agent for him; to which agency an end was put by the death of Doctor *Graham*. The Counsel for Plaintiff agree, that Doctor *Graham* could not have been compelled to do any act to complete his voluntary bounty; but insist, that he had completed the bounty, he intended, and could not recal it; and particularly his executors could not. At law these bonds must be considered as escrows, to be delivered to the obligee upon performance of the condition; and then they take effect from their original sealing and delivery: and the rule of law is, that though the obligor and obligee are both dead before the condition performed, yet upon performance of it the bond is good to charge assets. *Peryman's Case*, 5 Rep. 84. b. was cited as an authority for this. In that case it was taken as clear law, that it is good notwithstanding the death of either. There is a strong case to the same effect in the argument of *Froset v. Walshe*, Bridg. Rep. 1. from the Year Book, 27 Hen. VI, 7.

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Bond delivered to a third person to be delivered to obligee on performance of condition, takes effect on performance from original sealing and delivery, though obligor and obligee both dead.

I call

Bond by *fême* delivered to a stranger before her marriage, to be delivered on condition good, though condition performed after marriage.

I call it a strong case, because of the alteration of situation by marriage. The argument there was upon the effect of the death of tenants of the manor, to whom there had been a surrender out of Court; and proceeded thus: "If a *fême sole* do make an obligation; and deliver it as an escrowl to a stranger to be delivered upon condition; and she marry, or die; and then the condition is performed; and the bond delivered; it is a good bond; and so it is resolved in *Brag's Case*, and in *Butler's Case* also: and it is not like to a feoffment with warrant of attorney to make livery; or a grant of a reversion; and the feoffor die or take husband before livery or attornment: for there nothing passeth until the livery or attornment according to *Littleton*: and feoffee, if he enters, is but tenant at will; and it lies in the power of the grantor to countermand it." This is an answer to what was insisted upon for Defendant, that *Hamersley* was but an agent: in the judgment of the common law he was not an agent, but in nature of a stranger; and the authority was not countermandable and determinable. The bond intended for *Curtis* was one of Dr. *Graham's* as much as any of the rest: It was recovered upon as such. It was not impeached by the executors either at law or in equity. Plaintiff's security was actually cancelled. If the Plaintiff had been obliged to apply to a Court of Equity to compel *Hamersley* to go on to redeem the annuity, these questions of *Hamersley's* agency, &c. might have been very material: and he might have been told, that a Court of Equity does not interfere for volunteers. But this Plaintiff comes here in a much better situation, being in possession now of the annuity free from incumbrances; and asking the ordinary relief given by the Court in similar cases. Defendants are endeavouring to undo, what was done at law, or to raise an equity upon it to oppose the Plaintiff. They cannot undo what was done at law; let us see then, whether they can raise an equity. Ordinarily speaking payment made with my money and in my name to another person raises a trust for me: but that is only an equity, which may be rebutted by evidence. Here the evidence is all of one side. *Hamersley* says, that all Dr. *Graham's* preceding bounty was not a bargain. He might have taken the opportunity to relieve his estate from this incumbrance: but there is no evidence of such a design. *Hamersley*

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GRAHAM.

Court of
Equity does
not interfere
for volunteers.

Payment in
name of A.
with his mo-
ney raises a
trust; but it
is an equity,
which may be
rebutted by
evidence.

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Wersley says, his object was to disencumber the annuity for the Plaintiff, not his own estate for himself; and it is hardly to be imputed to a man, who acted with so much generosity, that he intended to take the annuity to himself without first securing an adequate provision for the son of his father's elder brother, who had very little other provision. As to the executor's claim by payment of any of these bonds; it was properly asked for the Plaintiff, for whose benefit? They could not buy it for the next of kin; nor lay out the testator's money for the remainder-man in tail. Upon the whole we think, the Plaintiff is entitled to the assistance of a Court of Equity to secure to him the benefit of this annuity: But there is a difficulty as to the particular decree. Defendants have properly waived the objection, that the heir at law of Lady *W.* is not before the Court: but still there is a difficulty to make a regular decree, such as ought to be made; because, properly speaking, we should now execute this trust: and, to do that we should have had the heir before the Court, and the will established; so as to execute it *in toto*, and not by piecemeal. Another difficulty also was properly waived by the Plaintiff: namely, the demand made of the arrears in the life of Dr. *Graham*, upon observing that he had acted with so much bounty, that it could hardly be considered as open to a demand for arrears in his life; therefore it was waived. The Court has no difficulty in directing the arrears of the annuity since his death as against Sir *James Graham*. But the difficulty as to securing the payments to the Plaintiff will still occur. If it was a general decree for the execution of the trust, probably the Court would have directed all the usual clauses. With regard to the farther security of this Plaintiff, the parties must by agreement among themselves settle it, or with the interposition of the Court: or else the Court must, as he has not taken the proper course by bringing the heir at law before the Court, leave that part of the case untouched. As to the rest, the trustee must have costs against the Plaintiff (99); and the Plaintiff must have those and his own against Sir *James Graham*.

Costs given.

Mr. *Burton*, for Plaintiff, offered to take security by bond of Sir *James Graham*: and it was ordered to stand over in order to have that proposal made.

(99) *Beames on Costs*, 146.

LILLIA v. AIREY.

1791.

March 5th.

ELEANOR AIREY being entitled under articles of separation from her husband to 80*l.* a year went to live with Mrs. *Lillia* the Plaintiff in 1774; and continued with her till 1782: when she became a lunatic; upon which her husband took her away; and placed her in a proper situation at 40*l.* a year. Plaintiff brought the bill for an account of what was due to her from Mrs. *Airey* for lodging, board, physicians and other necessaries; and to have a receiver appointed of the profits of her separate estate, consisting of the rents of salt-pans, and other premises; and to be paid out of them her demand with costs; and for an injunction to prevent any conveyance of her estate. Mrs. *Airey* had before her lunacy given the Plaintiff her bond for 66*l.*: but Plaintiff had gone into evidence to shew, that a great deal more was due for lodging, board, cloaths, physicians, money lent, and other articles: and that the husband had promised to increase her allowance to 100*l.* a year; but that promise was denied by the answer. Plaintiff had also gone into a great deal of unnecessary evidence to shew, that the wife was not really mad; but that it was a pretence made by the husband from sinister motives. For Defendant it was proved, that a sum greater than the demand was paid into the hands of Plaintiff for the wife by a person, who paid her annuity half-yearly; and Plaintiff brought down receipts from the wife.

Creditor of wife has a right in equity against her separate property; and against husband in respect of it, but not beyond it, if notice. Plaintiff with notice of separate allowance of the wife, a very weak woman, advanced to her wantonly beyond it; proof that she received more than the demand, she could make out; bill dismissed without account, the value being trifling.

Mr. *Mansfield* and Mr. *Fonblanque*, for Plaintiff.

£80 a year was too small an allowance. The husband was bound to support the wife.

Solicitor General and Mr. *Ridley*, for Defendant.

Plaintiff must first discharge herself from the sums, she received; which exceed the demand. When the state, the wife * was in, made it necessary, her husband took her home; and placed her in a proper situation. The agreement for the separate maintenance therefore must fail, when it becomes impossible for her to enjoy it any longer. To charge the Defendant Plaintiff must shew, that he paid away her separate

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 v.  
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rate estate in prejudice of Plaintiff's right, having notice of that right. One charge made by Plaintiff is 114*l.* for glasses and china broken by the wife. There is a will made by her in favour of the Plaintiff.

*Lord* CHANCELLOR.

This is a miserable cause. The parties have already spent here a great deal more than the money in dispute. It is impossible for me to send such matters as these to an account. The Plaintiff has gone into a vast deal of evidence about Mrs. *Airey's* madness. That is quite immaterial to her point; which is the same either way. Upon the question, whether a creditor has a right against the separate estate of a wife, and against the husband as allowing it to her, my opinion is, that *prima facie* a creditor has such right. The question here is, whether Plaintiff did not advance to her wantonly; for she appears to have been a very weak woman always. In point of equity, as far as her separate maintenance goes, her creditors have a right to be paid in equity; though in point of law she is not otherwise a *fême sole*. She contracted the debt, while in possession of 80*l.* a year. Her husband withdrawing the contract afterwards may be a more difficult point. Her bond will operate as a confession of her debt, supposing her at the time clear enough to confess it, if to no other effect. But it is out of all sight to go upon the husband beyond her separate allowance, when the Plaintiff, knowing she had a separate allowance from her husband, suffered her to run in debt beyond that. She cannot possibly go beyond it. The husband is more a formal party than any thing else; for Plaintiff really goes against the wife in respect of her separate estate. If the allowance was too little, the husband ought to have been applied to, remonstrated with, and consulted upon it (100).

Husband a formal party to bill against wife in respect of separate estate.

Costs refused.

The bill was dismissed; and without costs upon suggestion of Counsel, that Plaintiff was very poor; and the *Solicitor General* saying, he did not believe, she could pay costs.

(100) See the note, post, Vol. V, 17, to *Chassaing v. Parsonage*.

LEACROFT v. MAYNARD.  
PEARSON v. LEACROFT.

1791.

March 8th.

3 Bro. C. C. 233.

**T**ESTATOR by will in 1772 declared, that all his debts should come out of his real estate, and not out of his personal. He then gave to *Pearson*, sen. his undivided third part of an estate in *A.* for life: then to the wife of the said *Pearson* an annuity of 20l.: and, subject to those interests, gave all his real to three trustees upon trust to sell, and apply the produce in the following manner; viz. to pay to *Pearson*, jun. and some other persons 300l. each, payable at 21: to the trustees 50l. each, and their costs in the execution of the trust, to be preferred to the other legacies: then to the Foundling Hospital 2000l. to the Hospitals of *Leicester* and *Stafford* 1000l. each: and the surplus to such charitable uses as the *Lord Chancellor* upon petition should direct. Afterwards by a codicil he revoked the legacy to one of the trustees; and substituted in his place another trustee; to whom he gave the same legacy of 50l. In the same codicil he revoked the legacies to the Foundling Hospital, and the Hospitals of *Leicester* and *Stafford*; and gave 1500l. to the Foundling Hospital; 500l. to the Infirmary of *Nottingham*; and a sum to be distributed among the poor of the parish of *S—*. The first of these clauses, as they stood in the paper, was upon the bill of the heir at law to have the charitable bequests, as far as they affected the real estate, declared void under the Mortmain Act; and for an account of the debts and legacies, and of rents and profits received by the trustees; and to have those applied in discharge of the debts and legacies, as far as they would go; and upon payment of the rest to have the real conveyed to the Plaintiff. The bill in the second cause, which was in fact filed before that of the heir, was for establishing the will, and carrying the trusts into execution.

Testator, declaring his debts should come out of the real estate, not the personal, gave the real to trustees, charged with some charitable legacies, and one to each trustee. By codicil he removed one trustee; and revoked his legacy; appointing another with the same legacy. He revoked all the charitable legacies; and gave a less legacy to one of the charities, mentioned before, and other new charitable legacies, without specifying any fund: All held to be charged on the real estate; and therefore void as to the charitable legacies.

*Attorney General*, for the Charities.

In the codicil testator did not charge the legacies upon the land: there is nothing said in it about land. It seems, as if he knew, the manner, in which he had disposed before, would not be supported in this Court. The second legacy to the Foundling Hospital is therefore a pecuniary legacy; and must come

1791.

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out of the personal estate; that not being exempt from legacies, but only from debts. The other legacies are to charities not mentioned before; and have no connexion with the former part of this will; but are clear new bequests.

*Lord CHANCELLOR.*

Costs given out  
of the respec-  
tive estates.

You must also contend, that the legacy of 50*l.* given to the new trustee, substituted in the place of him removed, shall come out of the personal estate. I think, it is pushing it too far. The bill of the heir at law was quite unnecessary. He might have come under the other bill. As to the costs, I think it is just, that the costs of the personal estate should come out of the personal; those of the real, out of the real; and then the costs of this unnecessary bill by the heir at law will fall upon the real estate (1).

(1) *Cooper v. Day*, 3 *Mer.* cision as to the costs of the bill 154. *Post, Crowder v. Clowes*, by the heir is rather singular. Vol. II, 449. Mr. *Beames* (on See 176. *Basevi v. Serra*, post, *Costs*, 96) observes, that this de- Vol. XIV, 313.

1791.

March 8th.

Holder of a  
note gave it up  
on receiving an  
order to pay  
out of pur-  
chase-money.

It was not ac-  
cepted, but  
purchaser ver-  
bally agreed to  
give notice to  
attend, when  
the deeds and  
money were  
ready. He did  
attend accord-  
ingly; but be-  
fore the busi-

YEATES v. GROVES.

**D**AWSON, a brewer, being indebted to *Yeates* and *Browne* in 454*l.* upon a note of hand and interest, on the 28th of *May*, 1788, entered into partnership with *Groves* and *Dickinson*. By agreement they were to carry on the trade in the brew-house of *Dawson* at *Kensington*; the dwelling-house, which he held under the same lease, was to be for his sole use; but, in case he should retire from the partnership, the other partners were to have the offer of it. In 1789 *Dawson* retired; and it was agreed, that the dwelling-house should be assigned by him; and the lease was deposited in the hands of *Browne* for the benefit of all the parties. The attorney for *Groves* and *Dickinson* upon searching the register for the County of *Middlesex* found a mortgage upon this property of *Dawson's* for 2000*l.* *Browne*, not having heard of this before, before, business was over, drawer was arrested, and soon after a bankrupt: holder had a lien; the order not being given in contemplation of bankruptcy; though he knew drawer to be insolvent at the time.



before, insisted then upon payment of his debt; and under an agreement in *September*, 1789, that it should be paid by *Groves* and *Dickinson* out of the purchase-money of the dwelling-house, after discharging the incumbrance upon it, *Dawson* drew an order directed to *Groves* and *Dickinson* to pay the amount of the note and interest to *Browne* out of the purchase-money for value received; that draught to be a discharge to them for so much. The note was given up at the same time. That order was not accepted in writing; but *Groves* and *Dickinson* verbally agreed, that when the assignments were prepared, and the purchase-money to be paid, *Browne* should receive notice to attend. In *December*, 1789, the assignments being prepared, *Browne* attended in consequence of notice; but before the transaction could be gone through, *Dawson* went out of the room, and was arrested; and in *January*, 1790, a commission of bankruptcy issued against him. *Yeates* and *Browne* filed the bill, that they might be declared to have a lien for their debt upon the purchase-money after satisfaction of the mortgage (2). The bankrupt by answer submitted, whether he ought to have been made a Defendant.

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YEATES  
v.  
GROVES.

[ \*281 ]

*Solicitor General*, for Plaintiffs.

When this order was made, the bankrupt was so far solvent as to allow it to stand upon the ground of an available transaction. It was near three months before the bankruptcy. The Defendants agreed, that when the assignment was prepared, Plaintiffs should have notice to attend, and receive the money.

*Attorney General*, for the Assignees.

The evidence is not sufficient to create a lien; for they declined to accept; only undertaking to give notice to attend. It supposed, that *Dawson* should continue to be in a capacity to receive the money; and then he might say, "pay it to Mr. *Browne*, which will be the same thing as to me." He was in very bad circumstances at the time. His effects do not amount to above 700*l.*; though his debts are 10,000*l.* It is an inchoate imperfect transaction.

(2) The mortgage was stated to have been paid.



1791.

YEATES  
v.

GROVES.

Order, payable out of a particular fund, not a bill of exchange.

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Lord CHANCELLOR.

That order was not a bill of exchange, being payable out of a particular fund. The bankrupt seems to me to have been competent to make that order. It never has been thought even in the highest way of calculating fraud in these cases (3), the reasons of which I do not perfectly assent to, that, unless done in contemplation of actual bankruptcy, it would do: for if a man is failing in his circumstances, that is very good reason for pressing him. This is nothing but a direction by a man to pay \*part of his money to another for a foregone valuable consideration. If he could transfer, he has done it; and, it being his own money, he could transfer. The transfer was actually made. They were in the right not to accept; as it was not a bill of exchange. It is not an inchoate business. The order fixed the money the moment it was shewn to *Groves* and *Dickinson* (4). The bankrupt must have his costs; he ought not to have been a party; and the assignees ought to pay the costs, the defence being quite groundless.

For the Assignees.


If the assignees pay costs, there will be nothing left for the creditors. The Plaintiffs knew, the bankrupt was in insolvent circumstances.

Lord CHANCELLOR.

I will take it for granted, they did know, he was insolvent; it will not amount to any thing. I know, it has been surmised, that these transactions are frauds upon the bankrupt laws. It may be so, if in contemplation of bankruptcy. I will not contradict

(3) The effect of the relation of the commission, shall be valid, has been much contracted by the notwithstanding any prior act of stat. 6 Geo. IV, c. 81, s. 2, declaring, that all conveyances by, bankruptcy committed, provided the person, so dealing with the bankrupt, had not at the time of all payments by and to, and all such conveyance, &c. notice of contracts and other dealings and any prior act of bankruptcy. transactions by and with, any bankrupt, *bonâ fide* made and (4) Post, Vol. XIII, 122. *Ex* entered into more than two calendar months before the issuing *parte Alderson*, 1 Madd. 53.

tradict it now; especially as it is not before me. But it is admitted, the evidence does not go to that. They must pay the costs. They ought to have been consulted, before this suit was defended. They must pay over the costs to *Groves* and *Dickinson*, because they were necessary parties: but not those to the bankrupt; as he was not a necessary party.

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 YEATES  
 v.  
 GROVES.  
 Costs given.

GREEN v. SCOTT.

**T**ESTATRIX by will desired, that her estate as soon after her death, as conveniently could be, might be realized into cash; "and if it shall amount to 20,000*l.* I leave it thus; "if less, my will is, that it may go in similar proportions." She then gave some small legacies; "and after paying debts, "and funeral charges, the residue of my estate I leave thus; "to be divided in sixteenths;" which she gave to her executors in trust for her mother at *Bombay*, as to two-sixteenths for her life: two to her friend *Jackson*: five to his wife: \*four to her friend Mrs. *W*—: and the rest to different persons: but all the shares, except that to the mother, were given absolutely. She desired, her executors should be accountable to *Jackson*; but not to any heirs. She made *Jackson*, *Scott* and *Martin* residuary legatees. There was an excess beyond the sum of 20,000*l.* of about 1400*l.* Mrs. *W*— afterwards married *Green*: and they brought the bill claiming four-sixteenths of the whole property of testatrix after debts, &c. paid.

1791.  
*March 8th.*  
 Testatrix directed all her estate to be turned into cash; if amounting to 20,000*l.* to go thus; if less, in similar proportions: then, [ \*283 ] <sup>sub-</sup>ject to some legacies, debts, &c. the residue of her estate in sixteenths; two to her mother for life, the others to different persons absolutely. She then made three residuary legatees. The shares given are only of the 20,000*l.* subject to the charges: all beyond that

*Solicitor General*, for Plaintiffs.

Defendants claim, whatever there is above 20,000*l.* as residuary legatees: but testatrix meant to give the residue, whatever it might be, in sixteenths; though she computes it at 20,000*l.* As the two shares to the mother are given to her only for life, there is an absolute interest in them to satisfy the residuary clause. It is said, that the mother died before the testatrix; but that is not proved.

goes to the residuary legatees.

Legacy decreed to *fême covert*, settlement directed.

1791.  
 ~~~~~  
 GREEN
 v.
 SCOTT.

Attorney General, Mr. Mansfield, and Mr. Alexander, for
 Defendants,

No more than 20,000*l.* is to be distributed in sixteenths; which is all, that was intended to be disposed of. If testatrix meant that sum as synonymous with the whole of her fortune, it would have been useless to give the residue. It is plain, she meant, that after the 20,000*l.* exhausted something should remain, which she gave to the residuary legatees. The excess arises from the sale of some trinkets by auction, which produced about 700*l.* and from some interest due; these she could not have had in her contemplation. By the word "*residue*" she must mean what she had before expressed by the word "*estate*;" which she calculates at 20,000*l.* but does not say, what shall be the case, if it exceeds that sum. She has used the word "*residue*" improperly.

Lord CHANCELLOR.

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So it seems to me, I own. I suppose, this argument has not cost much; if it has, Plaintiff ought to pay for it. They must have an account taken; and four-sixteenths of the 20,000*l.* after deducting the charges upon it, declared to belong to them. The residue must go to the residuary legatees. As to the legacy said to be lapsed, there must be an inquiry, whether the * mother died before testatrix. As this is the case of a *fême covert*; let the Master direct a settlement.



1791.

HILTON v. BARROW.

March 8th.

If defence to bill for specific performance of agreement for a purchase depends merely on want of title in vendor, Defendant ought to rest on his

answer, and not file cross bill to have it delivered up, or to prevent an action; for Plaintiff cannot succeed at law.

BILL for specific performance of an agreement for purchase of an estate; that Defendant may take a conveyance, and pay 10,000*l.* being the purchase-money. The answer suggested some claim in the Crown, or in Lord *Derby*, as grantee of the Crown; and contained at length several opinions of Counsel, upon which Defendant grounded his refusal to take a conveyance; insisting, that Plaintiff cannot make a good title. Defendant also filed a cross bill to have the agreement delivered up;

up: and made the *Attorney General* and Lord *Derby* Defendants; and prayed, that they might disclaim any interest in the estate.

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Solicitor General, for Plaintiffs in the original bill.

The cross bill ought to be dismissed with costs on account of the extraordinary nature of it.

Lord CHANCELLOR.

The cross bill filed to have the agreement delivered up is not purely a cross bill; but that Plaintiff shall not hold it so as to bring an action upon it. Can I say any thing as to that without hearing the title? If it depends upon the mere want of title, the whole bill is nonsense; and ought to be dismissed with costs, unless there was fraud in the transaction: for, if Plaintiff cannot make a good title, he cannot succeed in an action; then why deliver it up? If Plaintiff in the cross bill means no more than to have it delivered up for want of a title, why did he not answer, and rest upon his answer? I think, it is not necessary to set forth all this history of transactions with attornies and opinions of Counsel in the answer; which, I suppose, is all repeated in the cross bill. The effect of it runs pleadings to a great length. A man may as well insert the history of his whole life. The true way of pleading is to plead facts. Refer* it to the Master to see, whether a good title can be made.

[*285]

For Defendant to the original bill was cited *Marlow v. Smith*, 2 *P. Will.* 198, that the Court is very unwilling to make a purchaser take a title, about which there is any doubt: and there it is stated, that opinions of Counsel were taken.

STRATTON v. BEST.

1791.
March 17th.

JOHN LIGHT in 1764 suffered a recovery of the manor of B—; though in fact he was entitled only to a part of it. He afterwards made a will, devising in general terms all his real and personal estate to trustees, &c. Election to take under or in opposition to a will can only be compelled upon something in the will, not *dehors*.

1791.
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 STRATTON  
 v.  
 BEST.

Mr. *Mitford*, for infants, made a question, whether as testator supposed himself entitled to the whole manor, which was proved by the evidence, that was not sufficient to put legatees to election.

*Lord* CHANCELLOR.

I think, testator did at the time of the recovery suffered consider himself as having a power to dispose of the whole estate; but can I construe it so, unless there is something in the will to shew it? Suppose *White-acre* and *Black-acre*; and that testator has a disposing power over one, and not over the other; can the Court admit evidence *dehors* the will to shew testator's conceit about it? I admit, you have proved, that in 1764, when the recovery was suffered, he took himself to be master of the whole. I have no doubt, but that, if he had been asked, when he made his will, whether he did not mean the whole, he would have said, yes: and, if desired to put in a description of it, he would have done so: that I believe upon the evidence, you have brought. But to do this I must say, that evidence *dehors* the will of testator's opinion at any time may be produced; and I do not think, that is the law of the Court. All the argument in *Noys v. Mordaunt* (5) and the whole suite of cases upon this subject have turned upon the expressions of the will. If I was to \*receive evidence of the testator's fancy, it would introduce a very desperate rule of property in this Court (6).

[ \*286 ]

(5) 2 *Vern.* 581. Upon the Mr. *Swanston's* observation in the Doctrine of Election, see the note upon the cases, that have notes, post, 523, 7. broken in upon this decision.

(6) See 1 *Swanston*, page 402.

1791.

EVEREST v. GELL.

March 22d.

Interest of residue of personal estate, given by will to a woman for

life, then the residue to her nieces, if they die without issue, over: the last limitation over is too remote; and on death of the aunt the nieces take the whole.

TESTATOR directed the interest of the residue of his estate, which was all personal, to be paid to *Mary Read* for life; and then gave the residue to her two nieces; "but if "they

“ they die without issue,” over. On the death of the aunt one of the nieces and her husband brought the bill on the ground of the remoteness of the limitation over, praying that Plaintiffs and the other niece might be declared entitled to the whole. The accounts were directed; and upon farther directions after the report the reserved question was, whether the limitation over upon the event of the death of the nieces without issue was too remote.

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EVEREST  
v.  
GELL.

Mr. King, for the limitation over.

The Court will go, as far as they can, in favour of the limitation over, if they can see any intention to confine the words to dying without issue at the time of the death: *Doe v. Lyde*, 1 Term Rep. B. R. 593.

Lord CHANCELLOR

Was at first inclined to think this the same sort of case as *Forth v. Chapman*, 1 P. Will. 663, and asked, what the words were in that case.

Mr. Lloyd said, the words there were “*leaving no issue.*”

It was admitted, that there did not seem to be any thing in this will to shew, testator meant dying without issue at the time of the death.

Lord CHANCELLOR.

All, that was determined in *Doe v. Lyde*, was, that the Court would not imply an estate tail. The nieces must be declared entitled to the whole (7).

(7) See the cases collected by Mr. Cox in the note to *Atkinson v. Hutchinson*, 3 P. Will. 262; and Mr. Sanders's notes to *Beauclerk v. Dormer*, 2 Atk. 308. *Fearne's Exec. Dev.* 167, &c. 4th ed. by Mr. Powell. *Jacobs v. Amyatt*, 4 Bro. C. C. 542. Post, Vol. XIII, 479, n.; and the following cases in this work: *Chandless v. Price*, *Bradley v. Peinoto*, III, 99, 324; and the note, in p. 102. *Younge v. Combe*; *Thellusson v. Woodford*, the great modern case of perpetuity, IV, 101, 227. *Rauclins v. Goldfrap*, V, 440. *Crooke v. DeVandes*, *Boehm v. Clarke*, IX, 197, 580. *Kirkpatrick v. Kilpatrick*, XIII, 476. *Barlow v. Salter*, XVII, 479. *Elton v. Eason*, *Bennett v. Earl of Tankerville*, *Donn v. Penny*, *Browncker v. Bagot*, XIX, 73, 170, 545, 574. 1 Mer. 20, 271. *Massey v. Hudson*, *Leake v. Robinson*, 2 Mer. 130, 362. *Britton v. Twining*, 3 Mer. 176. *Beard v. Westcott*, 5 Taunt. 393. 5 Barn. & Ald. 801. 1 Turn. 25. *Gayler v. Cadby*, 1 Jac. 346.

1791.

## EAST INDIA COMPANY v. HENCHMAN.

May 3d.

Demurrer allowed, the bill not connecting the fraud with the transaction sufficiently.

General charge of combination to defraud too loose. Charge, that Defendant was appointed resident at the *East India Company's* factory at *M.* not a sufficient charge, that he was factor.

**T**HE bill was for an account of all sums disbursed and received by Defendant on account of certain contracts mentioned in it; and that he might be declared a trustee of all profits appearing on the account to have been made by those contracts; and, after deducting all *bond fide* payments made by him, that he might be decreed to pay the same to the Plaintiffs with interest at 12 *per cent.* (8). The bill charged, that the Defendant went out to *India* in 1765 as a writer in the service of the Company; and stated the usual covenants entered into by the servants of the Company; that he remained there in their service till 1780, when he returned to *England*; and went out again in 1785 in another capacity, and returned in 1790: that in 1775 Defendant being appointed resident at the Company's factory at *Moldah* at a monthly salary, which ought to have been taken as a full compensation for his trouble, entered into a combination with the Board of Trade at *Fort William*, appointed by the Company 1774, to defraud the Company: and for that purpose proposed to them, that if they would permit him to enter into certain contracts, he would let them have certain profits, or make them some gratuity; and, to give the transaction a colour of fairness, he proposed, that it should be by negotiation by letter: that by means of this collusion with the Board of Trade a contract took place, by which he was to supply the Company with all the silk, he could procure for three years: that he represented in his letters, that he was at a great expence in instructing the natives to twist the silk in the *Italian* manner; and in establishing a manufactory, erecting works, &c. and that, as he was under the necessity of alluring and persuading the natives to this new mode of work, the quantity, he should send the first year, would be very inconsiderable; viz. not more than to the amount of 50,000 rupees: that the Company could not be much damaged by taking such a quantity; but though he made those representations by his letters, he was at the time of the contract prepared to deliver a much larger quantity; viz. to the amount of a lack of rupees; and that Plaintiffs could not dispose of such a quantity: that he got the silk from the natives

(8) The rate of interest at *Bengal*.



natives at six or seven sicca rupees per seer; and charged the Plaintiffs thirteen: that this trade was very profitable till the appointment of the Board of Trade; soon after which it fell off: that Defendant had covenanted to keep in all instances books of accounts; and that he would not charge the Plaintiffs with larger sums, than he should pay upon their account: that Plaintiffs had expressly prohibited any of these contracts; and had reserved a power, that notwithstanding Defendant should have passed accounts with persons in *India*, that should not prevent him from accounting to them upon his return; and that the profits, he made by this transaction, amounted to 60,000%.

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COMPANY  
v.  
HENCHMAN.

The bill was very long; and contained the letters, which passed between the Defendant and the Board of Trade on the subject of the contract. To this bill there was a general demurrer.

*Lord* CHANCELLOR

Upon the opening found great fault with the manner, in which the bill was drawn; and recommended to the Counsel for Plaintiffs to amend; but they declined it, and pressed for a decision.

*Mr. Mitford*, for the demurrer.

This is not a subject, upon which the Court will entertain jurisdiction to give the relief prayed. The bill respects transactions, which took place during the first residence of Defendant in *India*. It means to say, that the Board of Trade empowered by the Company colluded with the Defendant in a contract for supplying the Company with silk at certain rates; it being principally his own manufacture, for which he established works: that notwithstanding these contracts entered into by the Board of Trade, yet Defendant is to be considered as trustee for the Company; and is to derive no advantage from the transaction. The bill does not charge, that he acted as a factor.

*Attorney General, Solicitor General, and Mr. Mansfield*, for Plaintiffs.

Defendant acted expressly contrary to his covenant. By this combination

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**EAST INDIA  
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combination he was to be buyer for the Company, and seller for himself. The profits made were for the benefit of the Company, which is one case: the contract was a mere colour, under which he bought from the natives; and under pretence of supplying the Company charged them nearly double.

*Lord CHANCELLOR.*

Every thing  
well pleaded  
is confessed  
by demurrer.

Servant taking  
by collusion  
more than be-  
longs to his  
office must ac-  
count: So  
must a stranger  
upon a bargain  
with a servant,  
which is a  
fraud on the  
master.

Factor buying  
goods, which  
he ought to  
furnish as fac-  
tor, taking the  
profits, and  
dealing with

his constituent as a merchant instead of taking factorage duty or a stipulated salary, must account: So must a manufacturer who obtained by collusion an unfair price.

I wonder, they did not charge, that he exercised this trade under the orders of the Company; and that by the colour of this contract he took the profits, as if it was his own; whereas it was the trade of the Company. That seems to be the natural charge. They confess every thing well pleaded by the demurrer. The question is as to the point of fraud. They have stated, that the object, appearing by the letters a fair transaction, was not a fair transaction; but that there was a secret understanding, by which Defendant was to take a contract upon terms, both parties knew to be injurious; and that both were to share the benefit. They say, this was the design: but it is not clear to me, that they have connected that design with the contract so executed: for if so, it would be difficult to maintain, that, if a servant enters into a contract, by which he is to gain more, than according to honesty he ought, he must not account. That point will do, if charged sufficiently; for if a servant will by collusion take greater profits, than belong to his office, that is a fraud, upon which an account may be demanded. It is so also in the case of a stranger; for if a stranger enters into a fraudulent bargain with a servant, acting on behalf of his master, to obtain a power only given by betraying the master, an account upon that fraud could not be resisted. But I do not see, that the bill has charged him upon that head, so as to involve him as a stranger; nor how his character of servant will involve him. The demurrer only drives at the bill, because it is so long, that it is not as intelligible, as if it had consisted of only twenty lines. If being a factor he buys up goods, which he ought to furnish as factor; and instead of charging factorage duty, or accepting a stipulated salary, he takes the profits; and

and deals with his constituent as a merchant, that is a fraud, upon which an account is due. If as a manufacturer, instead of demanding the price, which ought to be made by a rigid adverse bargain, he by collusion obtained a price, he ought not to have had, that also is a ground for an account. But my difficulty is, whether these grounds have been made the subject of the bill distinctly and neatly. One has been made out; which is the charging that outrageous price; and I was at first inclined to think, they had sufficiently made out the other, viz. that he undertook to act as factor; and that it was his duty to buy the silk for them in that manner, and upon their account; and that by collusion with the Board of Trade he dealt with them as a merchant, and not as factor; and took mercantile profits instead of factorage duty. But I now think, that saying, he was appointed resident at their factory at *Moldah*, is too loose. They ought to have pointed out expressly, as I have stated. If these things were properly charged, I do not see, how it could be argued for him; for I agree, they might be made a charge; but doubt, whether they are. If they do mean to charge him with taking mercantile profits, why do they not say expressly, that he undertook as factor for a stated salary; and, that, instead of being contented with that, he charged as a merchant, which was injurious? But it is sadly pleaded by endeavouring to connect those general covenants with his appointment to the factory, and to connect that employment with that of buying the silk; and charging loosely, that he entered into a combination with the Board of Trade, and they with him, is not the proper manner of pleading: there is no good sense in it; it is very vexatious and absurd. If they really mean to charge, that he gave advantages to the Board of Trade, why not make them parties also? I am sorry to be obliged to say, that no bills in this Court are so reprehensible as the bills of the *East India* Company. In three or four instances, that I have known, they have appeared to make use of the opportunity, arising from their monstrous property, to very vexatious purposes. Allow the demurrer: and let them file another bill in three lines to lit the point; instead of stating all these letters to shew, that transactions, appearing fair, in fact are not fair. Where is the use of that? What is the allegation? (9)

(9) *Ryves v. Ryves*, post, Vol. III, 343.

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 EAST INDIA  
 COMPANY  
 v.  
 HENCHMAN.

1791.

*May 3d.*

Devise of annuity of 50*l.* to be purchased by executor, who, till the purchase, was to pay annuitant 40*l.* a year. Executor, instead of purchasing, paid 50*l.* a year from testator's rents. Annuitant entitled to 40*l.* the first year, and to 50*l.* a year afterwards. Though the Court might have charged executor with the over-payment from the estate, the Master on a general account with just allowances cannot.

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1791.

*May 4th.*

Defendant to bill for discovery and account objecting by answer, that he had no concern in the business, must answer fully, though such a plea would bar both discovery and relief. But if the fact is so, there cannot be a decree against him. Son employed under, paid by, and accounting to his father may be a witness, but is not accountable to his father's principal.

BROWNE *v.* SPOONER.

**T**ESTATOR gave by will an annuity of 50*l.* to be purchased by his executor; and till purchased directed his executor to pay the annuitant 40*l.* a year. The executor did not purchase an annuity; but paid the annuitant 50*l.* a year out of some ground-rents, part of testator's estate. Upon an account directed against the executor with just allowances the Master refused to allow him more than 40*l.* a year in respect of this annuitant; upon which he excepted.

*Lord* CHANCELLOR.

The person entitled to the annuity, directed by the will to be purchased, has a right to have it purchased forthwith: it must be so, if the executor had performed the will. He paid 50*l.* a year to the annuitant; who has nothing to do with it; and cannot suffer by his neglect. If any one is in fault, it is the executor for paying it out of the income, instead of purchasing it; which he was bound to do immediately, that is, after the expiration of the year from testator's death: so that for the first year the devisee of the annuity was only entitled to 40*l.* But you have no case, I am afraid, to turn it upon the executor; for which there must be a special case: otherwise it will stand under just allowances. Yet certainly the estate suffers by it. But though the executor might have been so charged, it is the business of the Court to make the charge: and the Master under a general reference of just allowances could not. Therefore allow the exception.

CARTWRIGHT *v.* HATELEY.

**T**HE bill was brought by the executors of Lord *Dudley and Ward* for a discovery and account of all the money received and paid by *Thomas Hateley* and *John Hateley*, his

his son, in the management of his *Lordship's* coal works. Both Defendants were charged as agents in that management at a salary from Lord *Dudley and Ward*. The son by answer insisted, that he was not agent for Lord *Dudley and Ward*; but was employed by his father, who paid him a salary. Upon exceptions the question was, whether it was competent to the son to insist upon this in his discharge: and supposing it was, whether he could do it by answer. The father on this day submitted to account.

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CARTWRIGHT  
v.  
HATELEY.

*Attorney General* and Mr. *Abbot*, for Plaintiff.

The son having been employed, and received money for his father, is accountable to the executors; and it is not material, that he might be accountable to his father; which will not prevent him from being likewise accountable to the executors. But he cannot take advantage of this by answer. Both Lord *King* and Lord *Macclesfield* have determined, that a Defendant cannot by answer insist, that he is not obliged to answer; but it must be by plea; and your *Lordship* decided so in the case of *Williams v. Farrer* in this Court.

*Solicitor General*, for Defendants.

There was an action at law against the father, but not against the son, because they considered him as a clerk to the father.

Lord CHANCELLOR.

If he was employed under the father, even to the whole extent to which the father was employed, and accounted to him, he might be a witness; but cannot be an accounting party to the Plaintiffs (10). But this cannot come on by exceptions. If he had pleaded, that he had no concern in this business but as agent for his father, and consequently was not accountable to the Plaintiffs, that plea might have barred every thing. I cannot, \* consistently with general rules, upon exceptions treat an answer as being as conclusive as a plea. I remember a case before Lord *Bathurst*, who did take some such measure; but I know, the propriety of it was doubted

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(10) See *Le Texier v. The Margravine of Anspach*, post, Vol. V, 322.

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 HATELEY.

doubted at the bar, and by me; though I believe, I obtained the order. The parties had matter to allege against being obliged to set forth very voluminous accounts; and Lord Bathurst, to prevent the inconvenience of a great expence to the parties, took a pretty strong measure upon it. But I do not like to adopt it; for to do so we must say, that, if there is any part of the answer, which, if made out, would entitle the party to a decree, he need not answer the rest. I determined this point in this way yesterday upon argument. Then, as the case stands, Plaintiffs will have the oath of the Defendant *John* as to all he acted in under his father; and he will have his costs for being brought here at all; for the bill must be dismissed against him with costs; being a bill for discovery against one not liable to an action at law, and not engaged in the business at all. They have brought a bill against a witness; and, as he has answered, I cannot deliver him from answering fully: but he must have his expences for being brought here; and I think, it ought to be as between attorney and client. But the question is, as the father is willing to account, whether Plaintiffs will go to a decree *ad computandum* against him, waiving their action at law, with liberty to examine the son and all other parties upon interrogatories; for they cannot get a decree *ad computandum* against the son; though they may oblige him to answer; and perhaps get it from him in a less efficient manner than by interrogatories. If they will take the decree so, they must pay him his costs now; if not, over-rule the exception, and let him answer (11).

(11) The principle, that a mere witness, who has no interest in the subject, cannot be made Defendant to a bill for a discovery, as to what he can say upon the matter, though properly examinable as a witness, is recognised in *Plummer v. May*, 1 Ves. 426; *Finch v. Finch*, 2 Ves. 493. Post, *Weymouth v. Boyer*, 416; *Le Texier v. The Margrave and Margravine of Anspach*, Vol. V, 322. XV, 160; *Fenton v. Hughes*, VII, 287; XII, 343; *Whitworth v. Davis*, 1 Ves. & Bea. 545; *How v. Best*, 5 Madd. 19. The case of corporations is an exception to this rule. As they are not liable to a prosecution for perjury, the secretary or book-keeper may be made a party: *Wych v. Meal*, 3 P. Will. 310. *Dummer v. The Corporation of Chippenham*, post, Vol. XIV, 245. *Gibbons v. The Waterloo Bridge Company*, 5 Pri.

The Plaintiffs agreeing to the proposal, *Lord Chancellor* decreed, that Plaintiffs should waive their action (which had only

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491. In the case of fraud also a party to the fraud cannot object his want of interest in the subject. 2 *Atk.* 234. *Mit.* 153. As to the other point in this case, it seems clear, that no defence in bar of the discovery sought can be alleged by answer; but ought to be by demurrer, if the want of title to the discovery is apparent upon the bill; otherwise, by plea: *Cookson v. Ellison*, 2 *Bro.C.C.* 252; which case however was questioned in *Jerrard v. Saunders*, post, Vol. II, 454. But there seems to be an exception to this rule in the case, where the discovery will subject the party making it to pain, penalty, or forfeiture; which a Court of Equity will not permit to be the consequence of a mere mistake: *Wrottesley v. Bendish*, 3 *P. Will.* 236; *Finch v. Finch*, *Mit.* 152, 153, 223, 245. 1 *Swanst.* 192. In *Wrottesley v. Bendish*, Lord *Talbot* held clearly, that the Defendant ought to have demurred; but he held the answer sufficient without the discovery upon the particular reasons, that a contrary decision would subject the Defendant, a *fême covert*, to a forfeiture of her whole provision; that the condition of the deed was in restraint of marriage, and would be void in the Ecclesiastical Court; that the bill was for the forfeiture, (which was the

very word in the deed), a case very little favoured in this Court; and that it would be contrary to all rules of equity to make the Defendant suffer so much for a mistake of her Counsel. In *Finch v. Finch* Defendant having twice insisted by answer, that he was not obliged to make the discovery, was compelled to answer all, except what would directly subject him to penalties. But a Defendant, who has answered, will at the hearing have the like benefit of any matter of bar to the relief prayed as if he had pleaded or demurred: *Norton v. Turvill*, 2 *P. Will.* 144. 3 *P. Will.* 150. *Harris v. Pollard*, *ibid.* 348. In *Mit.* 192 it is said to have been considered as more convenient to allege by answer, than by plea, that Defendant is not the person he is in the bill alleged to be; or does not sustain the character he is alleged to bear: and *Curth.* 61, and *Prac. Reg.* 278, are cited. That seems to be the same species of defence as that of *John Hateley* in this case: but in the passage cited Lord *Redesdale* was considering it as a defence to the relief. Another exception to the rule is the case of a purchaser for valuable consideration, without notice: *Jerrard v. Saunders*, post, Vol. II, 454. The general point, that a Defendant cannot by answer refuse to answer fully,

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 CARTWRIGHT  
 v.

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 Costs given.

only proceeded as far as the plea) and go to an account against Defendant *Thomas*, with liberty to examine Defendant *John* and all other parties upon interrogatories; and costs to *John* as far as related to his being a Defendant; both parties undertaking to pay, &c. as in case of a decree *ad computandum* (12).

subject to some exceptions, was after much discussion, post, in *Dolder v. Lord Huntingfield*, II, 283, the two following cases, and *Rowe v. Teed*, XV, 372, determined in *Leonard v. Leonard*, in the Court of Chancery in Ireland, 1 Ball. & Beat. 320; and *Somerville v. Mackay*, post, Vol. XVI, 382; 3 Madd. 70. — v. *Harrison*, 4 Madd. 252. *Whistler v. Wigney*, 8 Pri. 1. 2 Madd. Pr. 266.

(12) The Lord Chancellor, im-

mediately after he had pronounced these directions, expressed a doubt, whether executors are not entitled to an account without entering into an undertaking to pay absolutely. The decree, as it appears drawn up by consent, has no such undertaking; and the bill is dismissed, as against the Defendant *John*, with costs to be taxed, but not as between attorney and client. *Reg. Book*, A. 1790, fol. 473. See *Beames on Costs*, 33, 216.

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1791.

May 4th.

### SEERS v. HIND.

Costs of course against executors, who are decreed to pay interest on account of a breach of trust.

**B**ILL by residuary legatee against executors, who had kept money in their hands, upon which account they were decreed to pay interest. Upon a demand for costs also against them;

Lord CHANCELLOR.

When I am obliged to give interest against executors as a remedy for a breach of trust, costs against them must follow of course (13).

(13) *Ex parte Chumley*, ante, 156; post, *Piety v. Stace*, Vol. IV, 620. *Pocock v. Reddington*, V, 794. *Rocke v. Hart*, *Mosley v. Ward*, XI, 58, 581. *Bate v. Scales*, XII, 402. *Ashburnham v. Thompson*, XIII, 402. 1 Madd. 308. *Ex parte Towns-*

*hend*, XV, 470. *Tebbs v. Carpenter*, 1 Madd. 290. *Quære* as to the general rule here stated: Post, *Sammes v. Rickman*, Vol. II, 36. *Ashburnham v. Thompson*, XIII, 402. 1 Madd. 308. *Beames on Costs*, 152, 3, 4.

Another question was, whether executors were warranted in disposing of a lease, as assets of the testator, where there was a proviso against alienation by the lessee.

1791.

SEERS

v.

HIND.

*Lord CHANCELLOR.*

If *A.* lets a farm to *B.* with covenant not to alien, and *B.* dies, may not his executors dispose of it? I think, it has been determined, that they may: and I have always taken it as clear law. It is an alienation by the act of God. I remember, *Lord Camden* entered into the question much in the same way. He took it to be clear law, that an alienation by death could not be a forfeiture. In case of a lease for years to *A.* it goes to his executor, not by way of limitation, as in the case of a remainder over, &c. but as coming in the place of the lessee. I understood it to be well settled, as I have stated. But I do not mean to lay down, that a man may not by a clause in his will provide, that in case of a devolution to executors it shall not be alienable by them: but it must be very special for that purpose (14).

Executors may dispose of a lease for years as assets notwithstanding a proviso or covenant that lessee shall not alien.

Testator may provide, that in case of a devolution to executors they shall not alien: but it must be very special.

(14) The Student will observe, limited to 21 years after lives in that such a restriction must be being.

ATTORNEY GENERAL v. HABERDASHER'S  
COMPANY (15).

1791.

May 7th.

THE information was for establishing a charity under a will. The Company were the trustees.

*Lord CHANCELLOR.*

The thing to be distributed is the surplus beyond the repairs and other charges. The Master ought to have reported the shares in *aliquot* parts instead of monies numbered; for the surplus must be an uncertain sum. The difference of the land

Where a surplus to be distributed is an uncertain sum, the Master ought to report the shares in *aliquot* parts, not in money.

The only way of administering a charity

(15) 4 *Bro. C. C.* 103.

is under general direction to trustees; in case of misbehaviour there must be a new information; but the Court will not keep the information, and execute under it from time to time.

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[ \* 296 ]

tax which may one year be four shillings in the pound, another year three, may make a difference in the profits; so may the failure of tenants, &c. therefore it ought to be distributed in *aliquot* parts to the proper objects according to the directions of the testator. As to the execution of the trust, it is not to be kept under the direction of the Court, to be executed by the Court from time to time, but is to be executed under a general \* direction to the trustees; which is the only way of administering a charity. Then the first thing, they are to do, is to repair; which must be *sub arbitrio bonorum virorum*. If the trustees misbehave, there must be another information upon the new ground. I cannot keep this information here for ever. I know, these applications (16) to the Court are very expensive; and for that reason I want to get rid of it (17).

(16) This was a petition.

ground to make a decree, would

(17) In *the Attorney General v. the Governors of Harrow School* upon information against trustees of a Charity, Lord *Hardwicke*, though he did not see any

not dismiss the informations; but kept it on foot in order to have a hand over the Trustees: 2 *Ves.* 551.

1791.

May 7th.

CLARKE, *Ex parte*.

Costs to committee of lunatic refused, because he had not passed his accounts regularly, though no fraud.

COMMITTEE of a lunatic, who had passed his accounts, not regularly, but the accounts of several years together, applied for costs.

Lord CHANCELLOR.

I will not give him the costs. If a committee desires to have costs, he must pass his accounts regularly, as he ought. It is of great importance, that committees should know, that they will suffer by not doing it; therefore to break though the general rule out of indulgence to any particular case is an injury to all the lunatics in Court. I do not doubt, that this committee acted fairly, as is stated; but I mean to pronounce, that the negligence of a committee in not passing his accounts,

as

as he ought, is alone a sufficient reason, upon which I will always refuse him costs (18).

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CLARKE,  
*Ex parte.*

(18) *Ex parte Catton*, ante, Order, 1792, in Mr. Beames's 156. *Fletcher v. Dodd*, ante, 85, *Edition of Orders in Chancery*, and the note. See the General p. 453.



CHUMLEY, *Ex parte.*

1791.

May 7th.

**T**HE sum appointed for the maintenance of a lunatic was \$50l. a year; but his estate had been increased by the death of a relation to 2000l. a year.

Lunatic is to have every comfort, his situation and fortune will admit of without any regard to expectants.

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\* Lord CHANCELLOR.

Refer it to the Master to inquire into his situation, and what would be a proper maintenance. Though 350l. might have been very adequate before, it is a miserable maintenance for a man of 2000l. a year, unless he is in chains, or in such a state as to be incapable of any degree of comfort. Next of kin and expectants are not to be considered; but the lunatic is to have every comfort, which his circumstances will admit of (19).

(19) *Dormer's Case*, 2 P. Will. 262. *Ex parte Baker*, post, Vol. VI, 8.



EARL POWLET v. HERBERT.

1791.

May 12th.

**B**ILL against a co-trustee of stock to have stock replaced, which Defendant had sold out; and with the produce of which he had purchased land, without having power to do so.

Trustee mistaking his power sold stock without authority; decreed to replace it immediately; if at a less price, to invest the surplus in the same stock to the same uses.

Lord CHANCELLOR.

Here is a breach of trust, involuntary upon the part of the Plaintiff, but voluntary on the part of the Defendant; but it does not discredit him; as he thought, he might lay it out upon land. Therefore the stock must be replaced; and it must be in such a manner, that he cannot get any money by the

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the transaction. He must do it *quamprimum*; for the Plaintiff is in danger all this time; and he must pay the costs (20).

The *Lord Chancellor* at first thought, that he must have the Master's Report, before he could make the proper order upon the Defendant; as he could not make an hypothetical order; but afterwards his Lordship said, he thought, he might order Defendant to replace the stock; and if for a sum less than that, for which he sold, to invest the surplus in the same stock for the same uses.

(20) *Beames on Costs*, 155. Post, *Caffrey v. Darby*, Vol. IV, 488, and the note in page 497.

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May 13th.

FORSIGHT v. GRANT.

Wife entitled under bond by the husband upon the marriage to a sum payable three months after his death for her for life, then for the children, if none, for her absolutely: by will he gave all real and personal estate he then had or might die possessed of upon trust to pay her the rents and interest for life then the whole

WILLIAM GRANT in 1761 entered into a bond for himself, his heirs, executors, and administrators, to pay 2000*l.* within three months after his death upon trust for *Gratiana*, his intended wife for life; then for her children lawfully begotten by him; if no children, then for the wife absolutely. The marriage took place. The husband afterwards gave by will all his real and personal estate, "which I now have, or may die possessed of at the time of my death," upon trust to pay the rents and interest of the whole to his wife for life; then to divide all, both real and personal, among the children equally, share and share alike; in case of the death of any without leaving issue his or her share to be divided equally among the survivors; and, in case of the death of all without leaving issue, to the Plaintiffs; "and I hereby revoke all former settlements and wills made by me." The husband died; and there was no issue. The devisees over brought the bill against the trustees for an account, &c. and the only question was, whether the widow was entitled to the benefit of the bond, and also under the will; or whether it was not a case of election.

equally to the children, if none, over, and revoked all former settlements and wills. There were no children. Widow entitled to both.

Solicitor General, for Plaintiffs.

Unless some expression in the will can be pointed out to put the widow to her election, this cannot be considered as a satisfaction. Under the deed she is entitled to a principal sum within three months after her husband's death: under the will only to the rents and interest during life; and therefore they are provisions of a different nature. But this will shews such intention; for the words describe not only all the property he had when he made his will, and before the 2000*l.* could be taken out of it, but also all, he should have at his death; out of which of course this sum could not be taken; not being payable till three months after. He expressly revokes all settlements made by him; and he never made any except by this bond.

Lord Chancellor without hearing the Defendants said, there was nothing in it; and held the widow entitled to both (21).

(21) See the cases upon satisfaction collected and distinguished in Mr. Sanders's note to *Belasis v. Uthwatt*, 1 *Atk.* 427. *Baugh v. Read*, ante, 257; post, *Richardson v. Elphinstone*, Vol. II, 463. *Couch v. Stratton*, *Tolson v. Collins*, IV, 391, 483, and the notes, ante, in pages 112, 259.

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BOYLE *v.* BISHOP OF PETERBOROUGH.

May 13th, 17th.
3 Bro. C. C. 243.

IN 1776 after the marriage of *Robert Boyle Walsingham* 5000*l.* to which *Charlotte Boyle Walsingham* his wife was entitled under her mother's settlement, was vested in trustees for life, then upon among all children of

devisee in such shares and manner, for such interests, with such survivorship, and to vest at such time, as devisee for life should by deed or will appoint: in default of appointment of the whole or part, equally, if but one, to that one, payable at twenty-one; nevertheless the shares of any attaining twenty-one in life of devisee for life to be vested; but payment to be postponed till her death: that clause, vesting an interest at twenty-one, held to relate only to the case of default of appointment; and one of two children being dead without issue after twenty-one, and without receiving any share, that circumstance will not prevent an appointment of the whole fund to the survivor. An illusory share may be accounted for by circumstances. Trustee to appoint cannot appropriate part of the sum appointed to himself; but may recal it into the original fund.

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upon trust for the husband for life, then for the wife for life, and after the decease of the survivor for all and every the child and children of the marriage in such shares and proportions, and in such manner and form, and to vest at such time, as the husband and wife or the survivor should by any deed or deeds, writing or writings, signed by two credible witnesses, or by will, direct, limit, or appoint; and in default of appointment, and as to so much as should remain unappointed, to all equally, to vest in the sons at 21, in the daughters at 21 or marriage, subject to the interest of the husband and wife for their lives. By the will of Lady *Kildare* two other sums, viz. 4000 and 8000*l.* were vested in trustees for the same uses, and subject to the same power of appointment.

In 1770 Lady *Frances Coningsby* devised all the residue of her personal estate upon trust to permit her daughter *Charlotte Boyle Walsingham* to receive the dividends and interest during her life for her separate use; and immediately after her decease to transfer the whole residue to and among all and every the child and children of her said daughter, if more than one, in such shares and proportions, and in such manner, for such interests, with such benefit of survivorship, and to vest at such time, as her daughter should by any deed or deeds, writing or writings, signed by two credible witnesses, or by her last will and testament, notwithstanding any present or future coverture, direct, limit, or appoint: and in default of appointment, and as to so much as should remain unappointed, upon trust for all and every the children of her said daughter, if more than one, in equal shares payable at 21, the shares of any dying under that age to go to the survivors; if but one, then for such only child, payable at 21; nevertheless, if any of the children of her daughter should attain 21 in the life of their mother, the shares of those so attaining that age were to be considered as vested *interests, and transmissible to their executors; but payment to be postponed till after the decease of their mother. Lady *Frances Coningsby* died in 1781 leaving her daughter Mrs. *Walsingham* a widow with two infant children, *Richard O'Brien Boyle* and Miss *Boyle*. In May, 1783, Mr. *Walsingham* being dead without having executed his power, Mrs. *Walsingham* by deed poll reciting her power
 under

under Lady *Frances Coningsby's* will, and properly executed according to it, gave to her son 4500*l.* stock, part of the fund bequeathed by that will, for the purpose of advancing him in the army; with a proviso, that nothing therein should extend to annul her power of appointment as to the remaining part of that fund; and also that, if she should die without making any appointment of the remaining part, that stock so given to her son should be accepted by him as a part of his share of that fund. The sale of that stock produced about 3800*l.* which was applied to the purchase of a commission in the army for the son; and by deed poll in *August*, 1783, in which year the son came of age, he declared, that it was applied in part of his share in the fund bequeathed by Lady *Frances Coningsby* in case of no future appointment. By a subsequent deed it was declared, that it had been recollected, that though the whole sum, arising from the sale of the stock appointed for the son, was in the first instance applied for his promotion, it was so applied under a condition, that the money arising from the sale of his former commission should be applied to replacing, as far as it would go, the stock sold. That sum amounting to 817*l.* was accordingly so applied, and made part of the securities; consequently the sum advanced to the son was reduced to 3000*l.* *Richard O'Brien Boyle* died before any other appointment, leaving a will, by which, reciting that he was entitled to a real estate in *Essex*, and to the reversion of one moiety at least of the residue of his grandmother's personal estate after the death of his mother, he devised the real estate and the reversionary share of that personal fund to his executors upon trust to sell the real, and to pay his debts with the produce; and, if that was not sufficient, to apply so much of the personal as would make up the deficiency. He then directed them to discharge a particular debt of 500 guineas, and gave several legacies; and then gave the rest to them in trust to pay the interest to his sister for her separate use, till she should have a child or children, who should attain 21; the principal equally to be divided among all her children, payable at 21, or within six * months after; but his sister to enjoy their shares during their respective minorities; and if she should die without leaving issue living at the time of her death, then for Lord *Shannon* absolutely. He also devised a
real

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real estate in *Ireland* in trust for his sister and her children, remainder to Lord *Shannon*. In 1789 Mrs. *Walsingham* by deed poll reciting the death of her son without issue, leaving his sister surviving him, then under age, and an only child; and reciting her desire to execute her power in favour of her daughter and such other issue, as she might afterwards have; appointed the trustees to be possessed of a fund of 60,071*l.* and all the other securities, over which she had a power of appointment, except a fund of 10,000*l.* upon trust, subject to the interest to herself for life, for Miss *Boyle* and all other children, she might afterwards have, according to her appointment by deed with or without power of revocation, or by will; and in default of such appointment, in trust for Miss *Boyle*, her executors, administrators, and assigns, to be vested in her subject to the appointment, or, in default of appointment, from the execution of that deed; provided, that nothing in it should extend to make void her power of appointment over the part remaining unappointed. Soon after in the same year she appointed the remaining 10,000*l.* in the same manner. In 1790 Mrs. *Walsingham* died, leaving Miss *Boyle* her only child and sole executrix.


Miss *Boyle* brought the bill, to have the benefit of these appointments by her mother, against the trustees, who refused to transfer on account of the claims of the executors of her brother under his will. There were three questions: 1st, whether Mrs. *Walsingham's* power of appointment was not gone by the death of her son, and consequently whether the subsequent appointments were not void: 2dly, whether any interest vested in the son at 21; and to what extent: 3dly, whether the appointment to the son was not illusory.

*Solicitor General, Mr. Mitford, and Mr. King, for Plaintiff.*

As to the will of Lady *Coningsby*, the declaration, that the shares shall vest at 21, only applies to the case of no appointment, or an incomplete appointment. After the appointment to the son Mrs. *Walsingham* had by the power, she reserved to herself over the remainder, precisely the same power over that, as she had before over the whole; which power continued after her son's death. A share was given to him in  
his

his life; and, if not, it cannot be contended, that, if she had, while both were living, a power of executing this appointment, if she had thought proper, by giving to them in moieties, the whole to go to the survivor if either should die without issue, which power in her cannot be disputed, the accident of her son's death, before she made the appointment, could prevent her from making such an appointment, as would have the same effect, as that appointment would have had in that event. The will gave the residue of the personal to the children of Mrs. *Walsingham* after her death in two forms; one by her appointment under her power; the other by the will; which was only to take place in default of appointment. The appointments made will carry the whole property to the Plaintiff, unless one of these two things can be maintained; that, her son being dead, there was an end of her power, and she could not afterwards appoint; or that the appointments made ought to be set aside in equity as an improper execution of her power. There is no doubt, that a person having such a power may execute it notwithstanding the death of one of the objects; that is consistent with reason; for otherwise if a child was born, and lived a moment, the power would be gone, which could not be the intention: so, if one of ten children died, it could not be executed for the other nine. But this has also been determined. In *Maddison v. Andrew*, 1 *Ves.* 57, Lord *Hardwicke* held it clear, that the death of one party did not affect the execution of the power as to the rest. If by the death of one of the objects such a power had been considered as gone, this would have been often a question. In *Duke of Marlborough v. Lord Godolphin* 2 *Ves.* 61, where some of the objects of a power of appointment had died, an appointment in favour of those living was held good. Then the question is, whether this power was improperly exercised. Courts of Equity will prevent such an appointment, as does not comply with the intention of the author of the power, though it may be a literal performance, but this has been both literally and substantially performed. She has done just what the testatrix intended, she should have power to do; viz. "among her children in such shares, with such benefit of survivorship and accruer of interest as she should think proper." She might have limited it to one for life with benefit of survivorship;

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ship; and had power to modify it, as she pleased, if fairly; and if she distributed the whole among all the children. When she made the first appointment for her daughter, her son was dead without issue, and unmarried; therefore no object of provision for him remained; and without doubt this appointment was good independent of the doubt arising from his death. Her second appointment was to the Plaintiff, and to any other children she might have; and if none, to the Plaintiff absolutely.


*Lord CHANCELLOR.*

Could she under this power make an appointment for children, before they were born?

For Plaintiff.

Yes; otherwise no appointment could be made to cover the whole fund; for in contemplation of law she should have children at any time. Her discretion was very extensive: under the express words she might appoint with such benefit of survivorship, and to vest at such time, as she should think proper. Though the son was above 21, when he died, and in case of no farther appointment, or an incomplete appointment, his representatives would have had a claim by the will, yet, as she has appointed, they have not. Suppose, she had limited a moiety to each when living, and, if either die without issue, the whole to the survivor; that would have been clearly within her power, expressed by the words "benefit of survivorship." As to the property under the settlement, no appointment of any part of that was made for the son; and the words are not quite so extensive, but generally "in such shares" and proportions, manner and form, and to vest at such "time," &c. but the words "with such benefit of survivorship" are omitted. That under the circumstances makes no difference; but it must depend on the same principle. The power being to appoint by deed or will, it must have been always considered as within the object of the settlement to retain the power during the whole life of the person to make the appointment; and the circumstances of the objects of the power must be considered with reference to the time, when it was to take effect: *Chadwick v. Doleman*, 2 Vern. 528, power of appoint-  
 ment

ment to younger children; the second son, having received the benefit of it, afterwards became the eldest; the Court thought, he had only a defeasible interest; and cut him out of the benefit of the rest; which shews, the time to judge of the real effect must be with reference to the circumstances, when the appointment is to take place. Here she had her whole life to execute it in; therefore a single child answered the description in the power, viz. "all and every child." It is clear, that under this instrument as well as under the will that part, vesting the interest at 21, could not take effect unless in case of no appointment or an incomplete appointment. She might have made the same appointment under the settlement as under the will; for the words "in such shares and manner" and "and at such time" would have been answered by giving the son a life estate, or part of the capital; and either would be sufficient, if not illusory: so she might have appointed a sum for her daughter while living; and have left the rest to go equally. In *Alexander v. Alexander*, 2 Ves. 640, Sir Thomas Clarke entered fully into the effect of this sort of power. The question was upon limited interests being given to some of the children; and the Court considered, that where the object was clearly to give a discretionary power of appointment, it extends to giving limited interests at any time; which is not illusory. Upon the authority of that case and the words of this power Mrs. *Walsingham* had a power to limit, as she thought fit. If she had by will appointed to them in moieties, and if either should die without issue the whole to the survivor, if one had died in her life, still it would have done, though her will could not take effect till her death. Upon the death of her son the only proper object of her bounty was her daughter; and if she could have made such an appointment, as would in the event have given the whole to her daughter, there is no reason for saying, such an appointment, as she has made, is void, because a person, who is dead and no longer an object, was the person, who if living could have disputed it.

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*Attorney General*, for Lord *Mulgrave*, Lord *Fitzgibbon*,  
 and Mr. *Phipps*, executors of *Richard O'Brien Boyle*.  
 The clause, which vests the interest at 21, is different from  
 that,

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that, which precedes it; which looks only to the case of no appointment, or an incomplete appointment; but the latter respects the whole; and directs, that it shall vest even in the life of the mother, and be transmissible, even if they die before her. The testatrix seems to have intended to put it out of the power of Mrs. *Walsingham* to defeat entirely any of her children; for suppose, there had been five or six children, and three or four had died in her life, \*can it be said, she could have appointed the whole to the survivors, when that clause is imperative upon her to appoint a transmissible interest at 21.

*Lord* CHANCELLOR.

Could an appointment to the executors of a dead child be a good appointment?

For the Executors.

I conceive, the will has vested in the children at 21 an uncertain sum; and the whole power remaining to her is only to fix the proportions; and when they are named the appointment has relation.

*Lord* CHANCELLOR.

Upon that hypothesis I ask the question. Would an interest appointed to the personal estate or representative of a dead child have operated as an appointment? I take it not without special words; but I do not speak positively, as I have not looked into the cases upon it.

For the Executors.

In *Maddison v. Andrew* an attempt to appoint to a deceased child was made; and it was not over-ruled upon the impossibility of doing it, but because it was an appointment by the mother to herself under pretence of appointing to a deceased child. It must be admitted, that under a general power there cannot be an appointment to the representatives of a dead child.

*Lord* CHANCELLOR.

But an appointment of the whole to the surviving children would be good.

For the Executors.

Yes: and it is upon the special words here, that my argument is founded. The testatrix clearly intended, that something should be given to the children, who should attain 21 in the life of their mother; who might have given, what she chose to fix, to their representatives; and therefore the Court may. In cases of a general power of appointment, where there is no such direction as in this case, it is not presumed, that the author of the power looked farther than to the very children; but if the power fixes the time, when the representatives may be looked to, there is no reason why it should not take effect; and here it is particularly marked by postponing the payment till the death of the mother. There is no objection to the direction in the will, that it shall vest at 21, yet that the mother shall have the benefit of it during her life: therefore, if this passage resumes the consideration of the disposition of the whole residue, and does not relate only to the case of an incomplete appointment, or none, such interest vested in him, as he according to the rules of the Court was entitled to; and is transmissible to his representatives; and will pass by his will. As to the 5000*l.* under the settlement; if Mrs. *Walsingham's* appointment by deed is good as to that, it is a contradiction to the engagement in the settlement; which says "among all and every the children of the marriage;" therefore a claim remains to the representatives of the deceased son. As to the appointment to the son; the condition is inconsistent with what the mother purported to do. It was a condition, that she should recal that sum of 817*l.* The first instrument was clear of any condition of that sort; it did not appear, at least not in writing, to have made any part of that execution; but is recited in a subsequent instrument. The mother, having by the original instrument executed her power to the extent of a certain sum, could not recal any part of it. The fund is between 70,000*l.* and 80,000*l.* So small a share, as was advanced to him, has always been looked upon as illusory with regard to so large a property. It would be so, if he had lived: and if so, his representatives are entitled to what he would have been entitled to.

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Mr. *Hardinge* and Mr. *Hollist*, for Lord *Shannon*, claiming in remainder under the will of *Richard O'Brien Boyle*.

[ \*307 ]

First: if Mrs. *Walsingham* had a power of appointment after her son's death, which I deny, it must have reference to the idea of a distribution as between two living children; and what in that view she has done is illusory. Secondly: all power of appointment was gone after the death of the son: or, in other words, there accrued to him at 21 a vested interest in a moiety of the unappointed residue, subject only to a reasonable appointment to be made by his mother in his life; but absolute, \*in case of his death before any appointment. Both these points depend upon the sound construction of the clause, by which, I say, an interest vested in him. That clause has no special reference to the case of no appointment or an incomplete appointment; but refers to her living after an interest vested with a power of appointment between the two children. The clause in case of no appointment or an incomplete appointment assumes her death first; for before that it could not be known; and gives the residue equally, &c. the next clause, vesting an interest, assumes her right of appointment over an interest vested, but subject to her discretion as to the amount. The reasons for saying, this is not with reference to her death without appointment are these; first, that very event of her dying without appointment is provided for differently by the direction, that in that event it shall be payable at 21, not vested only, secondly: that vested interest might continue in that shape till her death, and consequently while her power might be executed. The consequence of this construction is this; if the appointment of the residue is good after the death of the son, still it must be founded upon the idea of a discretion as between two living objects; and if this would have been illusory before his death, it does not lose that mark by the accident of his death without issue. What she gave to him was not more than a nineteenth part. In *Wall v. Thurborne*, 1 *Vern.* 355, a case of *Cragrave v. Perrost* (22) is quoted, where the question was upon an illusory appointment. The right of appointment was between children; one received 100*l.* professedly under the power; the other received 1000*l.* the Court held upon the mere disparity of

(22) 1 *Eq. Ca. Ab.* 345.

of the sums, that it was illusory: and Lord *Hardwicke* in *Maddison v. Andrew* adopts this case, as having determined it; and there it was an eleventh share. It is said, that what was given to the son was right; and also what was given to the daughter; because then no other object remained. What was given to the son was right, as far as it went; but it is not fair to consider it according to the existing circumstances at the moment; but what is fair and just between two living objects. A power of appointment is a discretion operating, as it has been said (23), as a distrust upon the children, and for the purpose of insuring their obedience. It may be a case of ten children; and one dies after a vested right accrues, or nine \*die; how can it be conceived, that a gift of the whole can be considered as a fair appointment?

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[ \* 308 ]

Lord CHANCELLOR.

When you speak of a vested interest, what do you say is the amount?

For Lord *Shannon*.

It is uncertain in point of *quantum*. One great difficulty is this: suppose, no appointment had been made, while both the objects were in *esse*; what is to be done by a parent wishing to execute honestly? Is it the law of this Court, that something must be given to the dead child? That would be absurd; for, if ten or twenty years had elapsed, the Court must consider, what was the situation of the child so many years ago. The power was absolutely gone, the instant one died. There is no power in the parent to give to the executors of a dead child; for the objects are certainly the children. *Maddison v. Andrew* proves too much, and differs from this: there it was the same, as if the child had never existed. In *the Duke of Marlborough v. Lord Godolphin*, besides that there was no vested interest, there was in that case the word "*such*;" which clearly distinguishes it from this case. Upon the doctrine of the Court in *Alexander v. Alexander* the condition was void; and the sum repaid by the son was paid in his own wrong. *Pawlet v. Pawlet*, 1 *Wils.* 224, a father had a power to appoint

to

(23) 1 *Ves.* 58.

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to younger children, as he should think fit, 30,000*l.*; he appointed 29,900*l.* to one, subject to the devises in his will, and 100*l.* among the rest; this was held void as an appointment on account of the restriction, being to be raised at all events.

*Solicitor General* in reply was stopped by the Court.


*Lord CHANCELLOR.*

There is no case, that I recollect, like this in point of circumstances. There are two questions. First consider, what would be the operation of such a power without the special words here. The great difficulty is to settle, what the law would be, where there is no such peculiarity of an interest vesting in the life of tenant for life. It strikes me, that if a sum is given to be enjoyed by *A.* for life, with power of appointment during life, and after his death for want of appointment to be \*enjoyed by five persons, naming them, it is not a vested interest in any of them till the death of the tenant for life. I think, the reason of the thing, the construction of the instruments, and the authority of the cases cited, concur to this; that a fund given in this manner does not by the form of the gift vest, her power subsisting upon it (24); and if not, except for that phrase it would not at all. Then the question is as to the effect and operation of that clause; and whether the phrase will alter, what would be the general effect in any other case. If any interest vested, it must be *modo et forma* as provided; that is in *aliquot* parts; and then the power is gone. Suppose there had been more children; and one after having attained 21 had died; shall the power remain as to the other children; or, if that interest vested in certain *aliquot* parts,

[ \*309 ]  
Fund given to  
*A.* for life  
with power of  
appointment  
during life, and  
after death, for  
want of ap-  
pointment,  
over; not a  
vested inte-  
rest till after  
death of tenant  
for life, the  
power subsist-  
ing upon it.

(24) This opinion, correspond- 661. IV, 636. *Reade v. Reade*,  
ing with Lord Coke's, 10 Co. 85, V, 748. *Casterton v. Sutherland*,  
in Leonard Lovies's case, and IX, 445. X, 255, 265. XIII,  
Lord Hardwicke's, in *Walpole v.* 246. By these, as well as *Cra-*  
*Lord Conway*, 3 *Barnard*, 153. *ningham v. Moody*, 1 *Ves.* 174,  
and *Maddison v. Andrew*, upon a and *Doe v. Martin*, 4 *T. R.* 39,  
power of appointment over a the interest is vested, subject to  
personal fund, has not been fol- be divested by execution of the  
lowed by later authorities: post, power. *Ex parte Beilby*, 1 *Glyn.*  
*Smith v. Lord Camelford*, Vol. II, & *Jam.* 167.  
698. *Malim v. Barker*, III, 150.

parts, will not all of them be vested? If so; then I must consider this, as if there were more children; and then say, that the *aliquot* parts vested in all; and that circumstance destroys the power. The form of it is, if no appointment, and for so much as is not completely appointed, to assign to all and every the children, if more than one payable at 21; if but one, then to that one, payable at 21. If it had stopped there, I must have looked upon it to be a provision at 21 after the death of the mother. But it goes on by directing, that if any such child shall attain 21 in the life of the mother, his or her share shall be considered as a vested interest, &c. I think, that must relate to unappointed shares; and the effect of that phrase is not to bind the shares to be appointed; not to say they should vest at 21; because the power, being during life, would itself specify, when they were to vest; and they might at any period of life without waiting for that period; for there was no limitation upon her appointment; and her children need not be 21, when they were appointees; therefore I think, this was intended to vest an interest only in default of appointment. That brings it to the question, whether the power has not lost its opportunity of being exercised by the death of the son; or whether there is a capacity of appointing, where only one child is left; and, if at all, whether it must not be with reference to the clause, which provides for its going in case of no appointment. The words breed the doubt. Where there are only two children, the power by way of exercise of discretion is totally gone by the death of one, before it is exercised; and it cannot be the same power in point of extent, as when meant to be a distribution among several; for which it \*is necessary, there should be several. But this clause made it proper for her to express, that she did intend her power to be executed. If there was no appointment, the consequence is, each would be entitled to a moiety, because there was no appointment. In respect of that clause she had a power to appoint to one only; for, though that is not a distribution, it is an expression, that it shall go by appointment, and not transmit for want of it. I think, the extent of her power is such as to enable her to express her intention: that she has done; and therefore it must go according to the intent. As to the point of illusion: supposing the argument good, that she had a right to make any appointment not illusory, it is difficult to say, that,

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when her son died without leaving any object, it could be illusory to give him no more than the sum, that was advanced: I do not know, how that could be argued. I agree, that, where there is gross inequality, and nothing more, that will do: but, where it is accounted for, and by the situation of the children is rendered humane, and wise, and discreet, the Court will not call it illusory; for that is fraud. As to the sum repaid by the son: the effect of the instrument is to recal that sum into the estate of the testatrix, not to appropriate it to herself. It is not objected, that she made a bargain to get part of that fund for herself, but only that if the commission cost less, so much should return to the fund, and be liable to her appointment as before. Being drawn back into the fund to be distributable as before, if it had been duly distributable afterwards to other children, you could have made nothing of it. It only lessens the sum originally appointed, and puts the argument as to illusion in a stronger point of view. If a trustee with regard to appointment will appoint upon condition of being paid for it into his own pocket, it is void, because corrupt: but if he draws it back into the original fund, it only lessens the appointment. But I say little upon the point of illusion; because I do not think, it was necessary for her to make any appointment at all to the son. As the case has happened, she need not have given him a shilling contrary to her purpose, that the whole should go to one; meaning to say, she had as much right to fix it in one surviving, as in nine, if nine had survived: upon that idea I think, the Plaintiff must prevail (25).

(25) This decision, which seems on the subject of appointment, at variance with *Reade v. Reade*, see post, *Fortescue v. Gregor*, post, Vol. V, 744, is confirmed *Reade v. Reade*, *Kemp v. Kemp*, by Lord Eldon, C. and *Reade v. Vol. V, 553, 744, 849, and* *Reade* questioned, 1 *Ves. & Bea.* the notes, in p. 750 and 853. 90, 92; and in *Folkes v. Western*, *Brudenell v. Elwes*, VII, 382. Post, Vol. IX, 456, the same decision was made, where one of *Butcher v. Butcher*, IX, 382. two objects was removed, not *1 Ves. & Bea. 79. Casterton v. Sutherland*, IX, 445. *Bax v. Whitbread*, X, 31; XVI, 15. an express satisfaction by way *Mocatta v. Lousada*, and *Dyke v. of advancement. M'Ghie v. Sylvester*, XII, 123, 126. *White M'Ghie*, 2 *Madd. 368. Noel v. v. St. Barbe*, 1 *Ves. & Bea. 399. Lord Walsingham*, 2 *Sim. & Stu. Daubeney v. Cockburn*, 1 *Mer. 626. 90. For the various authorities Leake v. Robinson*, 2 *Mer. 363.*

WAINWRIGHT v. WATERMAN.

1791.

May 12th, 17th.

IN articles of partnership between *Arnold* and *Pearkes* it was provided, that the former might appoint any person to be partner with the latter in his room for one moiety; and might direct the trade to be carried on with regard to his share by his executors for that purpose; and might bequeath his proportion of the stock, &c. *Arnold* by his will gave 10,000*l.* in the funds to his daughter *Mrs. Wainwright* for her separate use for life; and after her decease for an only child or all her children, equally to be divided at 21 or marriage; and he gave other sums to his other daughters and their children respectively in the same manner, with benefit of survivorship as therein mentioned. The testator recited his power in the articles; and in pursuance of it appointed his executors to carry on the trade in his room; and bequeathed to them his share of the capital, with power to dissolve the partnership, or to nominate any other person to succeed him or them; and gave them his freehold and leasehold estate in and near *Newgate-street*, upon trust to carry on the trade as long as they should think proper; and after the expiration of the partnership to sell the said estate, and apply the produce together with his share of the capital, his share of the capital and all

freehold and leasehold in trust to carry on the trade as long as they should think fit; and after expiration of partnership to sell the estates, and with the produce and profits of trade and all the rest of his estate form a fund to accumulate twelve years, then among the grandchildren living: By codicil he substituted his partner, who was his son in law, in the room of one executor removed; and desired, that, if his executors should continue trade, and his grandsons *T.* and *J.* should attain twenty-one, his executors would nominate each a partner for a quarter, when executors should think fit, with legacies at the same time, to sink into the estate if they should decline the partnership, or die before twenty-one; executors to advance any farther sum they might want to carry on trade; the rest of his property among all the grandchildren except *T.* and *J.* By another codicil he left it entirely in discretion of the executors to appoint *J.* or not; if they should not think proper, his legacy to be void: *T.* and *J.* both entitled to be partners and to their legacies at twenty-one, one executor, their father, being for admitting them, the other two against it: but if all had without fraud united in declaring *J.* unfit, they might have excluded him; in which case he could have taken nothing under this devise.

Residuary legatee need not be party to bill for specific legacy.

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capital, stock, and the profits of the trade, and all the rest of his estate and effects, subject to debts, legacies, and funeral expences, in forming a fund to accumulate for twelve years; then to go to such of his grandchildren as should be then living, equally to be divided, and to be transferred at 21 respectively. Testator afterwards by a codicil removed one of his executors; and appointed *Pearkes*, who had married one of his daughters, in the place of him removed; and, taking notice of his power, ratified it; but, if his executors should continue the trade, and his grandson *Thomas Wainwright* should attain 21, requested and directed his executors and the survivor to nominate *Thomas* a partner for one quarter at such time, as they should think fit; he also gave *Thomas* a legacy of 4000*l.* when he should become partner, but directed it to sink into the estate, if he should die before 21, or decline to be a partner. In the same codicil there was a disposition exactly similar in favor of *John Wainwright*, and upon the same conditions; and these legacies he directed to be paid out of his share of the profits of the trade accruing from the last general settlement previous to his death to the time, when they should become partners. All the residue of the profits of his share of the trade he gave among all his grandchildren, except

[*312] **Thomas* and *John Wainwright*, share and share alike; and, if *Thomas* and *John* should have occasion for another sum of money in order to carry on the trade, he empowered his executors to advance it out of the profits of the trade bequeathed for the benefit of the other grandchildren. Afterwards in another codicil he expressed himself thus; “It shall be entirely in the discretion of my executors whether they shall or shall not nominate and appoint my grandson *John Wainwright* to be a partner,” any direction in the former codicil to the contrary notwithstanding; and, if they should not think proper to appoint him, the legacy of 4000*l.* given to him by the former codicil was declared to be void. *Thomas* was of age in 1785; *John* in 1787. They brought the bill against the executors, praying to be admitted partners from the time they attained the age of 21 respectively, for an account of the profits from that time, and to have their legacies paid them. *Wainwright*, one of the executors and father to the Plaintiffs, stated, that he was always ready and willing to admit them; but the other

two executors refused, conceiving the words not to be compulsory upon them. The partnership expired 1790.

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Solicitor General and *Mr. Mansfield*, for Defendants

Objected, that the other grandchildren, who were residuary legatees, were not made parties, as they ought to be; for the executors did not admit assets; and the grandchildren might file another bill immediately for an account of testator's estate, &c.


Mr. Lloyd, for Plaintiffs.

This is nothing more than a claim of a specific part of testator's property. These legacies are specific; and in a case of specific legacies, where no distribution of the residue is prayed, it is unreasonable to bring residuary legatees before the Court; and this is according to the constant practice. Upon the merits both Plaintiffs are entitled; but *Thomas* at all events (26); for the direction is positive as to him without any discretion. The first codicil is a revocation of the will. *Pearkes* is interested; for by this he has got all the customers to himself. In the great case of *Richardson v. Chapman*, where an Archbishop devised his options to a particular object, Lord *Northington* thought, the executors might go out of the will; but the House of Lords reversed that decree; and thought, the will was mandatory *upon them; and, that they could not go out of it. It has been decided, and I admit, that, where there are three trustees, and one dies, the two others may, if the trust is coupled with an interest, execute it; otherwise if it is a naked power: but it is clear, that, if they cannot agree to execute it, neither the one nor the other can, but it devolves upon the Court; and their disagreement will not prevent the object of the testator's bounty, if there is no real obstacle to the contrary. So in the case of executors *Co. Lit.* 112, 181: where a power is given to executors, they must all join; and, if one refuses, the others cannot at common law execute it; and an Act of Parliament, 21 *Hen. VIII*, c. 4, past to enable the others to sell in that case; and, though the joint estate would have survived, yet during their joint lives they must all have joined.

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By

(26) The second time this cause *Thomas* seemed to be given up came on the question as against by the Defendants.

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By their answer they admit 8000*l.* to have been got by this trade with a residue of 5000*l.* more.

For Defendants.

Upon these codicils it was not the intention of the testator, when he gave the executors this discretion as to the time of appointing, that, if they never appointed, the Plaintiffs should lose the benefit of what was given to the rest of the grandchildren; but only in case they were admitted, and received their legacies. Can it be thought, he meant any thing imperative upon the executors against such express words.

Lord CHANCELLOR.

Upon the point of form I am inclined to think, the bill is sufficient (27). It is not a bill as to the general residue of testator's estate, but as to the legacies of 4000*l.* and the profits, giving the residue to others. The question is, whether they are not specific legacies; and whether the executors do not represent the other grandchildren. If they could bring a bill after this decree, the decree will be wrong; and they must be made parties; for the executors must be delivered: it would be unjust to leave them open. There must be an account of the general estate, if desired, and if assets are not admitted; for I considered them as legatees; and, like the case of every other legacy, liable to debts. But I will pronounce the decree upon the merits; and, if any thing can be made of this, it may be set down for farther argument or a re-hearing. The will is properly explained by the codicil upon the same subject. The executors *do not appear to be interested; for they are not entitled to avail themselves of the power given to them; but must make the utmost of the trade by the sale of the whole establishment of it, and consequently the good-will of the trade, to make the accumulation the better for the benefit of the whole family. The good-will and every thing belonging to the establishment must be sold for the benefit of the whole family some way or other; therefore the executors have no interest in it. The only question is, whether, as they differed in opinion about admitting the Plaintiffs,

some

(27) 1 *Eq. Ca. Ab.* 73, *pl.* 13. *Lawson v. Barker*, 1 *Bro. C. C.* 303. *Brown v. Douthwaite*, 1 *Madd.* 446.

some being for it, some against it, it is possible to exclude this Plaintiff under all the circumstances. I think, if the executors had united in declaring, that he was unfit to be admitted, and without collusion or fraud, that they had a right to exclude him; and the consequence must have been unfortunately, that he must have lost the 4000*l.* and all the rest: but as the circumstances are, and as they made no such declaration either before he was 21, or at that time, both Plaintiffs are entitled. Therefore let them be declared to be considered as partners from the age of 21 respectively; and let an account of the profits be taken from the last settlement before the death of the testator to that time, out of which their legacies must be paid; and they must have an account of the profits from that time; the rest to go to the rest of the grandchildren.

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JOHNSON v. BOYFIELD.

Mr. Justice BULLER, for the Lord CHANCELLOR.

1791.
May 24th.
Ld. CHAN.
July 9th.

UPON the marriage of Mrs. *Penelope Ransom* in 1749 several funds were settled upon her for life, afterwards to go among the children of the marriage absolutely, as she should

Infant not bound by his covenant.
Bond by infant for a just

debt: his mother and infant sister being entitled on death of *A.* without issue to 4000*l.* stock for the mother for life, after to her children according to appointment, if no children, to the mother, after death of the son covenanted to pay that debt, when either should become entitled to that stock. Upon marriage of the daughter the mother made an appointment of the stock in her favour; but next day the husband having notice of, and approving the covenants to pay the son's debt, and reciting his and his wife's intention to secure it "as aftermentioned," released all their right to that stock to the mother, and covenanted, that when the wife should be twenty-one, all their interest should be vested in her; and a trust was declared, that, if the obligee should have a right to recover that debt, it should be paid out of that stock. Afterwards, a bill being filed to set aside the settlement as an appointment by the mother for her own benefit without consideration, the parties were by agreement mutually released from the covenants in it; and the husband covenanted, that, if the obligee should have a right *in life of the mother* to recover the debt, it should be paid out of that stock. The mother died intestate before *A.* Determined, that a fair assignee of the debt had no specific lien on the fund; which could be liable only by being brought back into the mother's assets, as taken out in fraud

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should appoint; if no appointment, equally; if but one, to that one; if none, to Mrs. *Ransom* absolutely. By the will of her father *Abraham Dacan Ransom* 5000*l.* stock was given in trust for the sole use of his daughter *Elizabeth*, afterwards Mrs. *Shepley*, for life and afterwards to her issue. By the same will some real estates were given to Mrs. *Shepley* for life; then to her issue; if no issue, to Mrs. *Ransom* for life; with remainders to her issue. Other real estates were by the same will devised to Mrs. *Ransom* for life, remainder to her issue with power of appointment to her; remainder to Mrs. *Shepley* and * her issue. Mrs. *Shepley* with the consent of her husband declared a trust as to 4000*l.* part of the abovementioned 5000*l.* stock, (in case she should die without leaving issue, and upon condition of paying 100*l.* a year to Mr. *Shepley* for life) for Mrs. *Ransom* for life; afterwards for her children living at her death according to her appointment; if but one, for that one; if none, for Mrs. *Ransom* absolutely. Mrs. *Ransom* had two children; *Abraham Dacan Ransom*, and *Penelope*. She appointed the real estates, devised to her and her issue, in favour of her son. Her son died in the *East Indies*, indebted to *Tilly Kettle* in 1462*l.* by bond, admitted to have been given for a just debt, but while the obligor was a minor. The real estates appointed to him he devised, when he was of age, to his father, who died intestate. Upon the 11th *March*, 1778, Mrs. *Ransom*, and her daughter *Penelope*, then an infant, by deed, reciting the debt due from *Abraham Dacan Ransom* to *Tilly Kettle*, and that he had no legal remedy for it, and reciting their contingent interest in the 4000*l.* stock, covenanted with *Tilly Kettle*, that if they, or either of them, should become possessed of or entitled to that stock, they would pay the debt due to him within two years after they or either should become entitled to the transfer,

with

fraud of her creditors; for which it must be said, either, that there was no pretence for the compromise, or that no pretence for its providing for the debt only if suable in the mother's life: but the marriage brokage in the settlement was sufficient ground for the compromise, and the bill did not go on the other ground; therefore the common decree for account of assets, debts, and funeral expences without reference to that fund was made against the husband and wife as administrators. The debt of the son was a sufficient consideration for the covenants; and if the mother had survived *A.* there would have been a specific lien.

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with interest at 4 *per cent.* from the time of becoming entitled. Upon the marriage of *Boyfield* with *Penelope Ransom* the daughter, still an infant, on 1st *July*, 1778, Mrs. *Ransom*, in consideration of the marriage appointed the funds settled in 1749, (subject to her own life interest) for *Boyfield* and his wife for their lives; remainder to their children. She also appointed the contingent interest in the 4000*l.* stock, subject to her life interest, in favour of her daughter. Upon the 2d *July* by deed reciting the various interests of *Penelope* the daughter, and the transaction of the 11th of *March*, and that *Boyfield* and his wife had agreed to secure the debt due to *Tilly Kettle* “as hereinafter mentioned,” *Boyfield* released all his and his wife’s right to the 4000*l.* stock to her mother; and covenanted, that, when his wife should attain 21, her interest in that fund, and also all her interest in the real estates devised by her grandfather, should be vested absolutely in the mother: at the same time Mrs. *Ransom* covenanted not to make a will to the prejudice of her daughter to a greater amount than 500*l.* and a trust was declared, that “in case by the deed of the 11th of *March*, 1778, *Tilly Kettle* “shall have a right to recover the said sum of 1462*l.* then “that sum and the interest shall be paid out of the said 4000*l.* “annuities, or the money arising by the sale * thereof.” In 1781 by deed reciting, that a suit in Chancery had been instituted by *Boyfield* for the purpose of setting aside that settlement as being an appointment by the mother for her own benefit, and that the parties had come to an agreement, the parties were mutually released from the covenants in the settlement; and *Boyfield* covenanted, that “if *Tilly Kettle* “shall have a right *in the life* of Mrs. *Ransom* to recover that “debt, it shall be paid out of the said 4000*l.* annuities, or the “money arising by the sale thereof.” *Boyfield* afterwards got possession of those annuities. Mrs. *Ransom* died intestate in 1784. Mrs. *Skepley* died without issue in 1788. *Johnson* was assignee of the debt due to *Tilly Kettle*, which he purchased at a public auction for about 470*l.*; and he brought the bill against Mr. and Mrs. *Boyfield* as administrators of Mrs. *Ransom* to have that debt raised either out of the stock as specifically charged with it, or out of the general assets of Mrs. *Ransom*, considering that stock as part of them. The

Defendants

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Defendants denied assets. It was proved, that *Boyfield* had full notice of the transaction of *March*, 1778; that it was read over to him, and approved by him; and that he said, it was very honourable in the mother and daughter to bind themselves to pay that debt.

Mr. *Lloyd*, Mr. *Mitford*, and Mr. *Hollist*, for Plaintiff.

Unless this can be recovered, it will be a fraud upon the Plaintiff, who bought it fairly as the best bidder at a public auction. The deed of *March*, 1778, was a valid instrument as to Mrs. *Ransom*; and would have been so as to her daughter, if she had been of age at the time; and it was afterwards confirmed so as to bind Mr. *Boyfield* standing in her place. The deed of 1781 was a fraud on all the parties claiming under the prior deeds. The fund was made the property of Mrs. *Ransom* to enable her to discharge this debt: and the transaction of 1781 was to defeat the demand, if Mrs. *Ransom* should die, and so there would be no person, against whom the Plaintiff could proceed for it. The introduction of the settlement is strong to shew the meaning of the parties.

Solicitor General and Mr. *Stanley*, for Defendants.

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First; Plaintiff says, that this fund in the hands of the Defendant is to be considered as part of the general assets; but these Defendants have no general assets. Secondly; he says, that under the circumstances it is bound by a specific lien; and therefore answerable to his demand. There is no covenant, which has the least effect in binding it specifically. Plaintiff, considered as assignee of a covenant, is bound by all the equity, that would affect the first covenantee. The marriage settlement, under which alone they can claim, was a direct fraud upon Mr. and Mrs. *Boyfield*; because the mother under colour of her power of appointment bargained for herself, which she could not do. She did not give them at the marriage any thing for present support; but what was given was not till after her death. The words in the covenant, that "*in case Tilly Kettle shall have a right to recover*" shew, they were doubtful about it. If the whole effect of the settlement was fraudulent against them, they had a right to have it undone; but Mrs. *Ransom* having entered into that covenant,
by

by which in case of the death of Mrs. *Shepley* before her she was liable, they made that agreement for paying that debt: but Mrs. *Shepley* did not die before her; therefore that leaves it upon the effect of the first instrument. If it was part of the general assets, she might have transferred it in her life to any one; and no creditor could call it back.

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BULLER, J., to Counsel for Plaintiff.

What do you say as to this being a specific charge upon this fund?

For Plaintiff.

There are two questions; and either will be sufficient for Plaintiff. The only thing to be proved is, that it was the intention of the parties to pay the debt out of that fund. It appears, that that fund was in their contemplation; otherwise there was no occasion to take notice of it. The obligee in consideration of this contingency postponed his remedy at law. He could not have brought an action upon this bond till two years after the death of Mrs. *Shepley*. From the deed of 1781 it appears, that the Defendant himself thought, Mrs. *Ransom* was liable to pay out of this fund.

BULLER, J.

The debt, upon which this bill is founded, appears to have been originally due to *Kettle* from *Dacan Ransom* the son of Mrs. *Ransom*, and brother of Mrs. *Boyfield*. I cannot go so far as to say with the Counsel in the reply, that *Kettle* upon any consideration, * much less for this contingent advantage, postponed any remedy, he was entitled to; for the deed, by which this contingent interest was given to him, expressly states, that he had no legal remedy for that debt. Therefore in 1778 I must consider this as an obligation by Mrs. *Ransom* and her daughter from honourable motives, because they were satisfied, that it was a fair and just debt, and that it was incumbent upon Mrs. *Ransom* as a mother, and upon her daughter as a sister and amply provided for, to discharge this debt left unpaid by her brother. With this view the deed of *March* 1778 was made; by which they undertook to pay it, if either should become entitled to the 4000*l.* limited over, if Mrs. *Shepley*

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ley should die without issue. The transaction is simply this; the mother says to the daughter, "by your brother's death you are amply provided for. Without hurting yourself, or diminishing that part of your fortune which is now certain, there is a contingent sum, which perhaps may come to you; and if so, it is right to pay your brother's debt." With that impression that deed was made. It bound the mother without question: but the daughter was an infant, and therefore at liberty, if nothing farther happened to ratify it, to refuse. In *July*, 1778, the daughter, being about to marry *Boyfield*, continued in the same resolution to pay this debt; and an appointment was made by the mother to enable the daughter to make a settlement not only for the benefit of herself, but of *Boyfield* also; for he took an interest for life in all belonging to the daughter. It is proved also, that the debt now in question was fully stated to *Boyfield*. He was apprized of every circumstance belonging to it; and it is clear, that this deed was executed by him with full knowledge of every thing, that had passed. If it was material to distinguish between *Boyfield* and his wife, as the consideration was marriage, and the wife took a benefit, I should think, that, though an infant, she was bound by the deed. But it is not material to consider that; because, if he was bound, the Plaintiff is entitled to a decree in this cause; and after being apprized of and consenting to the assignment of this 4000*l.* to the mother, he is, I think upon the whole, bound to pay this debt. The next question is, what effect the release, obtained by him in 1781, can have upon this case. I am of opinion, that that was a fraud: and having recourse to a Chancery suit instituted by *Boyfield* against Mrs. *Ransom* to set aside the settlement was one strong feature of it. Whether it ever existed, * or was invented only to give colour to this release, I do not know: but if it did exist, no benefit could have been derived under it. Therefore it is a release obtained by *Boyfield* from his mother-in-law to defraud this Plaintiff of his debt. The only point, upon which I hesitated, was, whether this 4000*l.* ought to be considered as part of the general assets, or the decree ought to be founded upon the ground, that Plaintiff ought to be considered as having a specific lien upon it. I confess, I have balanced considerably upon that question; and am not
sure,

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sure, whether, if I was to make a decree upon the foundation of that sum being the general assets, it would not be a greater prejudice to Defendant, than if it is considered as a specific lien; for, though they deny assets generally in the answer, it proceeds upon the ground, that they deny this 4000*l.* to be part. But I think, the decree ought to be, because it is a specific charge upon the fund. Though there is great room for the observations made upon the penning of the deed, that it professes to be a specific charge in a particular event only, which never happened, yet the general intention appears to have been, that it should be paid out of that fund; and that creates a lien. The Counsel for Plaintiff has relied upon the words in the introduction; and they go far to shew the general intent; for there *Boyfield* and his wife had agreed to secure the debt as therein after mentioned. If then they meant this conveyance as the security for that debt, it follows pretty much of course, that it must be paid out of that fund. But as to the manner, in which it was secured, there is great weight in that; for it seems no longer left to the disposal of Mrs. *Ransom* or *Boyfield* and his wife in any way; but was vested in trustees; and being so, supposing it had remained in their hands, this Plaintiff standing in the place of the obligee would have a right to call upon them to pay him; and, if so against trustees, it follows, that, though it has shifted hands, and some way or other has got into the custody of the Defendant, yet the creditor's right is the same. Therefore it must be decreed a specific charge; and to be paid by the Defendant *Boyfield* accordingly. As to the costs; as this is a fraudulent attempt to cheat the Plaintiff, I must give costs as against *Boyfield*.

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Upon the 9th of *July*, 1791, this cause came on before the *Lord Chancellor* for a re-hearing upon the petition of the Defendant.

For Plaintiff, in support of the decree.

In the deed of *March* 1778 there is a general covenant, which would bind the assets of the mother. The words of that deed do not say, the debt shall be paid out of the 4000*l.* but according to the words interest was to be paid from the death of the tenant for life of that fund; and therefore their intention

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intention must have been, that it should come out of that fund. The debt was fair and *bond fide*, and suable immediately. The obligee postponed his remedy at law, till this fund should come into possession of Mrs. *Ransom* or her daughter, with a view to have it paid under this agreement. By the deed of 1781 it is clear, that in certain events these parties did mean to make this fund a fund for payment of this debt; for if the words "in the life of Mrs. *Ransom*" were left out, it would run thus, "if *Tilly Kettle* shall have a right to recover this debt at law, it shall be paid out of that fund, or the money arising from the sale." The Defendant has got this fund into his hands under the deed of 1781. It is not to be taken, that he got possession of it in right of his wife, but by the release of the mother. That deed of 1781 was voluntary, and a fraud upon the creditor. The covenants in it could not be enforced against the Defendant; because *Tilly Kettle* never had a right to recover that debt against Mrs. *Ransom*, as she died before Mrs. *Shepley*. If there was a specific lien upon the fund, Defendant had notice, that it was so bound; and therefore it was incompetent to him to take it. He took it bound, as it was in the hands of the mother; the whole transaction being recited in the settlement, read over to him, and approved by him as honourable in them. This being a debt, she could not give up the property; there was no consideration for that release; and under the statute 13 *Elix.* it would be void against creditors. Though Mrs. *Ransom* did not give up any life interest, yet her covenant not to dispose by will of more than 500*l.* to the prejudice of her daughter is a consideration for what, she took by the settlement. If she did act improperly in any other part of the transaction, there was nothing improper in this. If Defendant had not interfered, and Mrs. *Ransom* had been alive, the creditor might have called upon her. The effect of his covenant in the settlement is, that, when this fund shall come into possession, it shall be the property of Mrs. *Ransom* for that purpose of forming a fund among other things for the payment of this particular debt. The fund \*then was in the hands of trustees; and this Court would have made them parties to the suit; and seeing the fund was in the contemplation of the parties, would have ordered the trustees to transfer it; and would not have suffered

suffered her to disappoint that intention to the prejudice of creditors. The Defendant stands in the same situation, as privy to the whole. The question is, whether he will be suffered to claim this absolutely, and to take from Mrs. *Ransom* the means of paying this creditor though he had full notice of the destination of part to that purpose. The effect of his covenant in the settlement is either to bind this sum to the payment of this debt, or to transfer it to the mother, so as to make it part of her assets. Mr. *J. Buller* thought, there was a specific lien. It is the same to the Plaintiff, whether it is to be so considered, or as a charge upon the assets.

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For Defendant.

The Plaintiff has no other right than *Tilly Kettle*, under whom he claims. *Kettle* was a mere volunteer as a creditor of Mrs. *Ransom*, though the debt was perfectly fair and *bonâ fide* with regard to the son. As he was an infant, it was not really a debt, because it related to transactions with a minor; therefore he had no demand either at law or in equity. If Mrs. *Ransom* had entered into the most express covenant to transfer this fund in satisfaction of that debt, the creditor could not have come here to enforce it: That was decided by your Lordship very lately in the case of *Colman v. Sarrel* (28). The decree has proceeded upon a principle, which did not occur to those, who drew the bill. The bill has contented itself with stating in a few words the trusts of this fund. I admit, that it is given distinctly, in case Mrs. *Shepley* should die without leaving issue, to Mrs. *Ransom* for life, then to the children or child of Mrs. *Ransom* living at her death, and, if none, to Mrs. *Ransom* herself. The life estate of Mrs. *Ransom* was not given up at all. The contingency given up is such, as arises from the circumstance of the limitation over, by which the mother would have taken, if her daughter did not survive her. If the deed of *March* 1778 did bind the assets of Mrs. *Ransom*, though Mrs. *Shepley* should not die in her life, the subsequent deed affords reason to think, it must have gone beyond the intention of the \* parties. Without saying any thing of the impropriety of making her daughter engage her property, who was an infant, and<sup>r</sup> could not by law enter into

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(28) Ante, 50.

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into any engagement, I will repeat, that *Tilly Kettle* was merely a volunteer. But how is this an engagement to apply these annuities to this debt? It is nothing more than this; "I agree with you, that, if that fund shall come to me, I will pay the debt of *Kettle*:" not out of those annuities: could he have come here to restrain the disposition of that fund without securing him? No. The lien is stated to be, that they engage to give such security, as is therein after mentioned; that is a covenant, that they will pay it, if their fortune shall be improved by getting that fund. As far as this was the property of the daughter either absolutely or in contingency, it did not bind her at all; though I admit, a settlement might have been made upon the marriage to create a specific obligation upon that fund. The settlement was fraudulent. It recites the several interests of the daughter; viz. to the funds under the settlement of her parents in 1749 subject only to her mother's life interest; to a contingent interest in this 4000*l.* stock, part of 5000*l.* stock, given by the will of her grandfather *Ransom* to his daughter Mrs. *Shepley* and her issue, who agreed to give up that part of it in case of her death without issue for her sister Mrs. *Ransom* and her issue; to real estates given by the same will in remainder, if Mrs. *Shepley* should die without issue, to Mrs. *Ransom* and her issue; all subject only to the life interest of the mother; to other real estates devised by the same will to Mrs. *Ransom* and her issue, with power of appointment; which Mrs. *Ransom* appointed to her son, who, being of sufficient age to make a will, devised to his father, who died intestate, in consequence of which they descended to his daughter in fee. The settlement recited all this. Mrs. *Ransom* did not disturb her life interest in these funds; but by agreement made a settlement of the money funds under the settlement of 1749, by which she reduced the interest of her daughter to an estate for life in those funds, with remainder to the children; so they got nothing by that. As to every other fund; the husband without consideration of any thing for maintenance covenants for the daughter, that, when she shall attain 21, all her interest in the real estates shall be vested absolutely in the mother; and does this without any provision for himself, his wife, or children; and also covenants, that this 4000*l.* shall go absolutely to the mother; and there is no consideration

consideration for all this, except that the mother would leave her real and personal property to the daughter, though she had nothing but under these instruments. This settlement was a fraud upon the husband and wife; and the deed of 1781 recites a bill in this Court to set aside the settlement, as an appointment by the mother for her own benefit; and, that the parties had come to an agreement, which agreement is in the precise terms of the decree, your Lordship would have made; namely, the mother was released from her covenant not to devise her estate away from her daughter; and the husband was released from his covenant to assign all his property to the mother; also from the covenant as to this fund; and there is a covenant as to this debt, which is the same covenant as that in the settlement itself. That covenant amounts only to this; that, if the creditor should have a right to recover this debt in the life of Mrs. *Ransom*, he would pay it: then another answer is, that the obligation did not arise in her life. The agreements in 1778 and the settlement amount to nothing more than a personal covenant with the creditor: but do not refer to this fund at all. If it stood upon the settlement, he might say, he had as good a right to all the estate, the husband covenanted to release to the mother, as to this fund. This creditor does not come here to say, Mrs. *Ransom* was imposed upon by this agreement.

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It is one thing to say, the Defendant has bound the fund to the payment of this debt; another thing, that he has transferred the fund to the mother; in which case it would be bound as part of her assets; and any conveyance of it would be a fraud upon all her creditors, as well as this man. There are two questions. 1st: Was the original transfer of all the wife's fortune to the mother void as a marriage brokage. 2dly: If not, was the deed of 1781 fraudulent against this creditor by providing for the payment of his debt, only if it should fall to be demanded in the life of the mother; and consequently depriving her assets of that fund, if the debt was to be demanded after her death, which would otherwise be liable. If any thing moved from the mother, I should put the Defendants to argue, that it was not a good consideration for as-

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signing over the fortune of the daughter. The effect of the transaction between the parties is thus. The mother had come under an engagement to pay this debt to the creditor of her son, when either she or her daughter, \*should come into possession of this fund. That was very proper and honourable. The daughter joined; but being an infant there was an end of it as to her; she was not bound to pay it at all; but the mother, while she lived, was liable to be sued for it. The Defendant by the settlement makes a transfer to the mother of great part of his wife's fortune without any reciprocation but a general covenant not to make a will to the prejudice of her daughter to a greater extent than the sum of 500*l*. He made her covenant also, that, if she should become liable to pay that debt by the deed of *March, 1778*, she then should pay it in her life. If she had become liable, and had not paid it, in this Court her assets would have been liable to it. The covenant was, that she should not leave that debt upon the estate. The objection as to the unfairness of that transaction has been in some degree replied to: it is not upon the deed unfair; because her covenant to leave her whole fortune to her daughter might be an equivalent. When they came to arrange this business in 1781, she assigned back this fund upon the considerations mentioned by the *Solicitor General*; but the Defendant bargained, that, if the creditor should have a right *in the life of Mrs. Ransom* to recover this debt, he should pay it out of that fund. Suppose *Mrs. Shepley* had died in the life of *Mrs. Ransom*, and then *Johnson* had sued for the money; would there have been any answer to this obligation to pay out of that fund?

*Solicitor General* admitted, there would not.

Lord CHANCELLOR.

Then was the narrowness of that provision a badge of fraud? which seems the only point to be insisted on; for there is no ground to say, there was a specific lien. The awkwardness of the case is, that the Defendant took notice, that the mother was indebted to *Kettle*; he also thought to take those funds from her under the notion of marriage brokage: but then she was not to be left indebted to this man so as to be liable to



to be thrown into prison. Therefore it was provided, that, if it fell upon her during her life, then the Defendant would satisfy it; but if she should die without becoming liable, and nothing should be left, then the creditor would be disappointed, and it was not worth their while to provide for the payment of it. It looks like taking notice of it as a debt, which ought to be provided for notwithstanding the pretence of marriage brokage; \* and that they were willing to go so far as to keep the mother out of a gaol, but not to meet the justice of the case. Suppose he had a right to take the whole fund back, and that that provision was only through personal tenderness for the mother: he meant to be generous with regard to her, but did not mean to be so to the creditor. As I cannot think, Plaintiff can claim a specific lien by any means, the single question is, whether it was gratuitous, and a fraud upon the creditor, to re-assign to the husband that fund, she had so got. They must bring it back into her assets, as having got out of them in fraud of her creditors, and cannot say, this fund is liable through any other medium than by bringing it back into her possession; which they cannot do, unless by saying it was fraudulently given up as to creditors. If they offer that, they must say, there was no pretence for a compromise at all, and that it was a mere cover, which they cannot say; for there was pretence enough for that: it is plain, there was more than a common pretence of marriage brokage, and the compromise was upon that foot; or they must say there was no pretence for its being so totally annihilated as to be taken out of the fund to the prejudice of the creditors in one event and not in the other. They are driven to enforce that, that the circumstance of giving it up, if she should be liable to be sued, was a proof, that Defendants did not understand themselves to have a right to claim it absolutely. The only awkwardness is, that the husband thought himself bound to give up his pretensions to that fund *pro quanto* the mother was liable in her own person; and that, taking notice of that debt, they have rather sharply provided, that, if it shall not be suable in her life, though it shall against her executors, yet that the Plaintiff shall not be admitted to sue with effect upon her assets. Taking it in that point of view, that is more than the bill will enable

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enable the Plaintiff to get through. If the other event had happened, the consideration would have been quite sufficient to give a specific lien: but as in the event there clearly is no specific lien, the only way to get at it would be by bringing it back into her fund: but she never was entitled to it, unless they could have qualified that agreement with fraud; and the bill does not go upon that. Therefore there must be the common decree for an account of her assets without any particular reference to this; and, as there was no will, of her debts and funeral expences, and of this debt among the rest.

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## BRODIE v. ST. PAUL.

Mr. Justice BULLER, for the Lord CHANCELLOR.

Agreement for a lease of a farm, referring to a paper containing the terms: Bill for specific performance according to such clauses, as had been read to the Plaintiff: parol evidence to prove that was refused, and the bill dismissed. Bill being dismissed without costs, as a hard case, parties made trustees without their knowledge, and as such being necessary parties to the bill cannot have costs against Plaintiff, but left to their remedy against their principal: otherwise perhaps, if Plaintiff had prevailed; because then those costs might have been given over against other Defendants.

**D**EFENDANT having intimated his intention to relet a farm, which had been let at a rent of 400*l.* a year, Plaintiff proposed to become his tenant; and for that purpose they met on the 2d of *February*, 1787; when Defendant read from a paper certain *items* as the terms of their agreement; and an agreement was drawn up with reference to that paper; and that agreement, signed by both parties, was deposited in the hands of Mr. *Ayscugh*; and they were to meet again to complete the business. The second meeting took place on the 15th of the same month at *Ayscugh's* house; when the Defendant's steward produced a paper, which, he said, contained the covenants, which were to be inserted in the lease; and he represented it to be the paper, to which the articles of agreement referred; and which had been read to the Plaintiff, before the agreement took place. Plaintiff denied this; insisting that these covenants were quite new to him, and objecting to several. Defendant insisted, that all the clauses contained in that paper should be covenants in any lease to be made by him; and that all of them had been read to the Plaintiff at the first meeting. Plaintiff denied that; upon which the treaty

treaty was broken off, and the bill was brought for a specific performance of the agreement according to such clauses, as had been read to the Plaintiff, to prove which he went into parol evidence. The clauses, which had been read, were, according to the evidence, to the following effect (29): "The Plaintiff was  
 " to take the farm for 21 years at the neat rent of 400 guineas  
 " the first year, and 700*l.* every year after. He was to take  
 " upon himself the expence and risk of a proposed embank-  
 " ment of a rivulet; for which he was to be paid at the end  
 " of the term according to the value of it at that time, sup-  
 " posing it to stand. He was to build one hemel (30) and six  
 " cottagers' houses. He was to consume all the hay upon the  
 " farm, unless when it would sell for 3*l.* a ton. Sixty acres  
 " of uninclosed \* land were to be allowed to the landlord for  
 " planting; and the tenant was to be allowed for them accord-  
 " ing to the decision of two arbitrators: and this agreement  
 " was to be understood *bona fide* on both sides; and any  
 " doubt or dispute was to be settled at *Ayscugh*."

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The clauses in the proposals contained in the paper produced on the 15th of *February*, to which the Plaintiff objected as being new, or contradictory to the articles and the clauses, which had been read to him, were as follows: "A reserva-
 " tion to the landlord of hunting, fishing, &c. at all lawful
 " times upon the estate. A power to the landlord to inclose
 " eighty acres of uninclosed land; the tenant to be allowed
 " at the rate of five shillings an acre for it. A general reser-
 " vation of rent in blank without distinguishing the first year
 " from the rest. A reservation of a right of making bridges,
 " digging for gravel, &c. paying for damage according to
 " arbitration. Tenant to pay taxes, quit rent, and a *modus*
 " for tithes. Tenant to consume all the hay upon the farm,
 " except when the price should be 8*l.* 10*s.* a ton. To spread
 " yearly all the dung, except that of the last half year, which
 " was to be left for the landlord or succeeding tenant. Re-
 " servation of the willows for the landlord. Tenant to keep
 " in

(29) See the note, post, Vol. XI, 353, (*Rose v. Cunynghame*) on Lord *Redesdale's* observations, 1 *Sch. & Lef.* 35, in *Clinan v. Cooke*.

(30) Another word for "hovel."

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“ in repair all the banks, and defend the same from floods;  
 “ and to plant willows, where necessary, without any allow-  
 “ ance for it. Tenant to lime every summer fallow; to keep  
 “ and leave in repair bridges; and to make hedges with  
 “ an allowance of four shillings a rood, and fences and  
 “ drains.”

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The bill also prayed, that some mortgagees might confirm this lease made by their mortgagor; or come to an account with the Plaintiff; and assign their interest, subject to such benefit of redemption as there might be; that in the mean time Defendant might be restrained from selling or demising the farm; and Plaintiff be declared to have a lien, for what he should pay to the mortgagees with interest. Defendant by his answer for the first time set up as a defence to this bill a settlement made in 1778, under which his wife and others had an interest, and could call upon the trustees to sell for their benefit: but that settlement was never acted upon till after the agreement between Plaintiff and Defendant; when Defendant executed an appointment under it to trustees with directions to sell. The answer \*admitted, that the terms of the embankment of the rivulet, and the covenant as to consuming the hay upon the farm, were to be as stated by the Plaintiff, and that the clauses concerning the hemel, cottagers' houses, getting up hedges and fences, and making drains, were by a new agreement superseded and done away.

The parol evidence was read; the Counsel for Defendant saying he would not prevent it, as he wished the whole case to be before the Court; but, that he considered himself at liberty to object to any thing out of the agreement,

*Solicitor General, Mr. Mitford, and Mr. Romilly, for Plaintiff.*


An agreement for a lease for 21 years, in order to its being executed in this Court, must be in writing; but it is not necessary, that all the terms of it should. If this had been an agreement to let for 21 years, reserving 400*l.* the first year, and 700*l.* a year afterwards, with all proper and usual terms according to the custom of the country, the Court would

would execute it by reference to the Master to inquire into the custom of the country, or by directing an issue. Such agreements are continually carried into execution in this Court; and the minutiae are never all stated. For the same reason in this case, the articles stating the terms the parties had agreed to, and referring to covenants, which had been read as covenants to be inserted in the lease, the Court will make the inquiry, in order that the Master may settle a lease containing those covenants. There is no difference in principle between these two inquiries, nor any danger; for it is clear upon Defendant's case by the admissions in his answer, that it is impossible, the agreement could be, that all those covenants should be inserted in the lease. This paper therefore is not, what he wishes to represent it; for it is in many instances contradictory to the articles. This is therefore a case, in which collateral evidence is necessary. If it was merely a lease for 21 years without specifying any covenants, the usual covenants would be understood to be intended. As to the interests of the other parties: Plaintiff has a right to redeem the mortgagees, if they will disturb the enjoyment under this agreement by their mortgagor. That settlement would not have been heard of, if Plaintiff would have executed such a lease, as Defendant chose. But this Court will decree the \* Defendant to procure his wife and the trustees to join to enable him to execute the agreement: he is bound to endeavour at least to get in such interests: *Barrington v. Horn*, 2 *Eq. Ca. Ab.* 17: a man covenanted for himself and his wife to join in levying a fine to the Plaintiff; in his answer he insisted, that he was tenant for life, remainder to his wife for life, remainder over; and that, his wife not having executed the deed, nothing passed. The decree was, that he should procure his wife to join; as he had covenanted (31). If this will

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(31) Bond by husband reciting an agreement to settle wife's estate; but she was not an executing party: it might amount to an agreement to bind him to oblige her to do it. 2 *Ves.* 526. See Mr. Fonblanque's note, in his edition of *A Treatise on Equity*, Vol. I, 293, 2d ed.; the note in 3 *P. Will.* 190, *Hale v. Hardy*. Post, *Morris v. Stephenson*, Vol. VII, 474. *Emery v. Wase*, VIII, 505; where the principle of these cases is powerfully controverted. 2 *Jac. & Walk.* 425, 1 *Madd.* 6, 7.

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will not do, Plaintiff has a right to an execution of a lease by him, if Plaintiff chooses to take it; and though that will not prevent the wife from turning him out (for though it appears, she acceded to the terms of the lease, yet as her consent was not in writing, he cannot avail himself of it) yet, if turned out, he would have a remedy against the husband, and another equity at least for the damages and costs sustained by the non-performance; for Plaintiff has been at a great expence in preparing to take so extensive a farm. If a lease is not made to him, because Defendant covenanted to do, what he could not do, he ought to put Plaintiff in the same situation. If a man covenants, that his wife shall levy a fine, she must do it, or he must answer the damages. Upon this principle was the case of *Denton v. Stuart* (32), 4th July, 1786, before Lord *Kenyon*, then Master of the Rolls. The bill was for specific performance of an agreement; after it was made, Defendant assigned to another person; the decree referred it to the Master to inquire, what damage the Plaintiff had sustained; and directed, that what should be found should be paid to him with costs. Mr. *Mansfield* for the Defendant did not then resist that decree farther, than by desiring that the inquiry might be, whether any and what damage had been sustained; but the decree was the other way. There is no difference in principle, whether a man puts it out of his own power, or makes an agreement, knowing that it is not in his power, and does not bring forward the objection. The objection made is a fraud. If those covenants can be reduced to a certainty in any way, he has made an agreement for that purpose. It depended upon his consent, whether the estate should be sold under the settlement or not; for nine years after he never intended to sell; \*and his entering into this agreement must have been with a view to keeping the estate, or to selling it with more advantage; and the appointment after this agreement to the trustees to sell was a fraud upon the agreement. The equity of the Plaintiff therefore is a reference to see, what were the covenants, that according to the agreement ought to be inserted;

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(32) Post, *Greenaway v. Adams*, *Stewart* is stated from Sir Samuel Romilly's note. 1 Cox, 258. Vol. XII, 395. *Gwillim v. Stone*, XIV, 128. *Todd v. Gee*, XVII, 1 Fonb. Tr. Eq. 44. *Blore v. Sutton*, 3 Mer. 237.

serted; and that Defendant may execute a lease to bind himself with those covenants, even if his own life should not endure during the lease; and that he may procure the persons interested to join in the lease.

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BULLER, J.

Is there any case, in which this Court has decreed specific performance of an agreement not so certain as to sustain an action at law? In general a party having an agreement has an election either to come here, or bring an action (33): but if no action could be maintained upon it, is there any case, in which this Court has executed it? Suppose, I refer it to the Master; I must leave it to him to form an opinion directly in the teeth of the Statute of Frauds.

For Plaintiff.

Either the Master or an issue must ascertain, what the terms were.

BULLER, J.

Then it must be done by parol evidence. I think, there is a wide difference between this case and that you have compared to it, of an inquiry as to the custom of the country; there the agreement is certain; here the parol evidence is to ascertain, what was the contract between the parties at the time.

For Plaintiff.

The Plaintiff was right in coming into this Court; because he did not know, the Defendant was incapable of executing this agreement; though, if he had known that, he ought to have gone to law; but the assignment to the trustees was made by the Defendant after the bill was filed.

Mr. *Mansfield*, for Defendant.

Here the dispute is, what was the agreement; and there is nothing

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(33) In cases of agreements entertained the suit. *Amb.* 406. before Lord *Somers's* time the See *Fonblanque's* edition of *A* party was sent to law; and, if he *Treatise on Equity*, Vol. I, 149, recovered any thing by way of 2d edit.; where the opposition in damages, the Court of Chancery the cases on this subject is stated.



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nothing more uncertain or more difficult to ascertain, than what were these covenants, which are very uncommon. Defendant says, they were all read; Plaintiff denies it; and this is to be decided by parol evidence; which is doing the very thing the statute meant to prevent.

BULLER, J.

I am very clear in my opinion upon that point.

Solicitor General, in reply.

Allan v. Bower (34), lately before the *Lord Chancellor*: a farm was let to the Plaintiff at 60*l.* a year: there was an agreement by parol, that, if the tenant would make some improvements, lessor would make a grant of it to him for life at the same rent: lessor died, having devised to the Defendant: a paper was found at his death, desiring, that the Plaintiff and another might not have their rents raised; as he had promised, that this order should be given by him, not being willing to grant them leases; as it was reasonable for him to do on account of the improvements they had made; which must have distressed them. This paper was signed by the lessor, but not attested by witnesses. It was no agreement; being only a memorandum in the party's own possession. An ejectment was brought by the guardian of an infant; and the bill was for an injunction. The answer denied the agreement, but admitted finding the paper. The *Lord Chancellor* was for granting the injunction; and said, the agreement to grant a life estate to the Plaintiff must be abandoned; but that clearly there was some agreement to grant some interest to him; therefore he directed a reference to inquire, what interest was intended to be granted; and said, the rule to direct the Master would be easy; for the term must be according to the money laid out by the Plaintiff; but that he must consent, if the term to be granted was such, as would before that time have expired, to pay to the Defendant an increased rent equal to the additional value of the farm. The Master refused parol evidence; and upon the ground of the statute reported, that the Plaintiff was only entitled, if to any term, to a lease for three years; which was the longest, that could be by the Statute of Frauds;

(34) 3 *Bro. C. C.* 149.

Frauds; and it was again referred to him to state the promise made, and referred to by the paper. But in stating this case I must also state, that, though the *Lord Chancellor* was clear in his opinion, the Counsel mean to bring it before him again, not being satisfied. This Court will sustain a bill, though there could be no action at law. All the cases are, where the Court sees, that there must have been some agreement; and they have been in the habit of inquiring, what is the agreement, which resulted from the circumstance of subsequent enjoyment, where the agreement is only in parol. But this case is not upon the Statute of Frauds; for there is a wide difference between a paper duly attested, referring to something not attested in the same manner, and what is merely in parol. If a man by will attested by three witnesses refers to a paper not so executed, this matter of parol must be gone into; namely, whether that is the paper referred to. If a man by will attested charges his estate with legacies, it will be charged with legacies in a paper not attested (35); though the principle of the statute is, that no man shall give the value of land in any manner, but by three witnesses. If a testator says in his will, "I give my lands in such manner, as I shall by a writing appoint," if he appoints by a paper unattested the moment before his death, it will do, according to *Habergham v. Vincent* (36), before the *Lord Chancellor*, who has given a strong opinion upon it, though it is not a decision: testator by will properly attested gave lands to such persons, as he should name in any deed: the deed naming the devisees was executed only by two witnesses: the opinion of the *Lord Chancellor* was, that the effect of the paper attested by three witnesses would be sufficient to pass it within the statute. Suppose the Plaintiff had drawn a lease; and had inserted in it the covenants, he avers were read; and had tendered it; he might have brought an action for non-performance of this agreement; for if a reference may be to a written paper, it may be to such part, as was read; and *certum est, quod certum reddi potest*. Suppose an agreement to insert reasonable covenants merely; not the usual and reasonable covenants; the Court would see, what would be reasonable covenants; like all those cases, where the Court, finding there has been an enjoyment, seeks, what was the probable agreement between the parties.

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(35) *Brudenell v. Boughton*, 2 Atk. 268. (36) *Post*, Vol. II, 204.

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I rather think, the case of *Habergham v. Vincent* went upon a different ground; and that the question there was, how far the deed operated to bind trustees. You suppose, there is no difference between referring generally to a paper, and referring to such part as was read: but there is a wide difference: for, where the reference is general, the paper, if sufficiently described, speaks for itself; but here the whole is to depend upon parol. I must look into the case of *Allan v. Bower*, before I decide this.

For Defendants.

As to *Allan v. Bower*; there could be no doubt, but that parol evidence might be received there according to the practice of every day; because the ground was, that, in confidence of having that interest, the tenant had laid out a great deal of money; and without doubt a parol agreement so performed is to be enforced; and the paper found was a proof of that. *Habergham v. Vincent* has no relation to this case. It is certainly a very important point, that a will may by reference to a writing not attested pass land; for it is enabling a man to dispose of all the beneficial interest in his estate by will not attested; for the will remains a revocable instrument; the testator gives himself no power by it, which he had not before; and the only operative instrument is the unattested paper. But the present case is simply this; can this agreement be enforced in equity or at law for an interest in a real estate? That can only be decided by parol.

BULLER, J.

The same construction at Law and in Equity upon the Statute of Frauds; and part performance of a parol agreement takes it out of the statute.

The case of *Allan v. Bower* has been answered; it is, as stated for the Defendant. That paper imported, that the tenant had been at a great expence, which distressed him. My opinion is the same as at first. As to the part-performance; Courts of law have lately adopted the same sort of reasoning, that prevails in this Court; that there can be but one true construction upon the Statute of Frauds. Whatever it is, it ought to hold equally both in Courts of Law and of Equity; and that, as it is settled in Equity, that a part-performance takes it out of the statute, the same rule shall hold

at

at law (37). But the distinction is, that all those cases are by the part-performance taken out of the statute. That distinguishes them from the present case. Here there is no part-performance; nothing taking it out of the statute. The question here is, what is the agreement? The whole depends upon parol. If the agreement is certain, and explained *in writing signed by the parties, that binds them: if not, and evidence is necessary to prove what the terms were, to admit it would effectually break in upon the statute; and introduce all the mischief, inconvenience, and uncertainty, the statute was designed to prevent. The only thing to support this case would be to prove by parol evidence, which of these covenants were read, and which were not: that is directly prohibited by the statute; and therefore the bill must be dismissed; but without costs; as the circumstances are not very favourable to the Defendant (38). Costs given.

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Costs were desired for the mortgagees and trustees, as having been brought before the Court by the Plaintiff, and being otherwise without remedy; and it was said by the Counsel for the trustees, appointed by *St. Paul* to sell the estate under settlement, that they had never executed the deed of trust, but were made trustees without their knowledge: and that, even if the decree had been for the Plaintiff, their costs would have been of course.

(37) Post, Vol. VI, 39. *Cooth v. Jackson*: 183. *Evans v. Bicknell*: 333. *The Marquis Townshend v. Stangroom*: this doctrine is exploded by the *Lord Chancellor*.

(38) Post, *Jordan v. Sawkins*, 402. *Pym v. Blackburn*, Vol. III, 34. In the note pages 38, 9, 40, are collected various cases exempted upon equitable grounds from the operation of the Statute of Frauds. *Rose v. Cunynghame*, XI, 550. XV, 523. For the distinction between enforcing and resisting a specific performance upon parol evidence of a variation from the written contract, see *Rich v. Jackson*, 4 Bro. C. C. 514. Post, Vol. VI, 334. *The Marquis Townshend v. Stangroom*, VI, 328. *Woollam v. Hearn*, VII, 211. *Higginson v. Clowes*, XV, 516. *Ramsbottom v. Gosden*, *Clowes v. Higginson*, 1 Ves. & Bea. 165, 524. *Garrard v. Grinling*, 2 Swanst. 244.

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Costs refused.

They were all necessary parties for the Plaintiff to bring before the Court. I cannot give them costs without making the Plaintiff pay them; and I am of opinion, that he stands in a hard case; and ought not to pay any costs. If the decree had been for the Plaintiff, perhaps I might have given those trustees their costs; because I could have given them over against the other Defendants: but, as it is, they must have their remedy against their principal (39).

(39) Mr. Beames, on Costs, p. 47, note 25, questions this.

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WAKE v. WAKE.

May 31st.

3 Bro. C. C. 255.

Widow put to election to take under the will of her husband or dower notwithstanding great disproportion.

Receipt of a legacy and annuity under the will for three years did not prevent her right of election, being presumed not to have acted with full knowledge, which would bind her.

BULLER, J. for the Lord CHANCELLOR.

TESTATOR bequeathed to his wife 100*l.* to be paid out of his personal estate within six months after his death; and after some particular dispositions gave all his estate and effects whatsoever upon trust, subject to an annuity of 35*l.* to his wife for life, for his son by a former wife, whom he made residuary legatee. The widow received her legacy, and also the annuity for three years; and then brought the bill, claiming both the interests under the will and her dower, which was about 80*l.* a year, the real estate being admitted to be about 240*l.* a year. The trustees had let the son into possession of the real estate upon attaining 21; as was directed by the will.

BULLER, J.

Must she not elect?

Mr. Mitford, for Plaintiff,

Said, that it was so like the case of *Jones v. Collier, Amb.* 730, that he found it difficult to argue it, unless upon the ground of the great disproportion.

BULLER, J.

But even that will not do. She must elect.

Solicitor General for Defendant. She cannot now elect.

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That is contrary to all the cases. In *Boynston v. Boynston* (40) the wife had received it; and the *Master of the Rolls* said, that should not prejudice her. *Pusey v. Desbouverie*, 1 *P. Will.* 316. 10,000*l.* was bequeathed to a person entitled under the custom of *London* to a share of her father's fortune: she had released all her claim; and brought a bill on account of the disproportion; * and she was held not to be bound till after the accounts taken. *Lord Beaulieu v. Lord Cardigan*, *Amb.* 533, where the devisee was considered as entitled to elect all his life. If he elected to take under the will, he was to make a conveyance by way of condition: but, as he did not, his representatives were held to be entitled to elect. In *Hender v. Rose*, 3 *P. Will.* 125, *n.* the same doctrine was held; that parties are not to be taken to have made election without complete knowledge of their rights; and, that in no case shall a child be obliged to elect till after the accounts taken. Here though the widow has received the legacy and annuity, she has not released or done any thing, that can be called an election.

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For Defendant.

If this is not an election, when can a person be said to have elected? For the same reason the time may be extended to nineteen or twenty years. In a late case, where the time was a little longer than in this, the *Lord Chancellor* held the wife bound; and said, that, if parties act a great while under the will, they shall not elect: *Butricke v. Broadhurst*, 3 *Bro. C. C.* 88 (41). There must be some time, at which the parties shall be said to have elected. I have heard the *Lord Chancellor* say over and over, that that case upon the will of the Duke of *Montague*

(40) 1 *Bro. C. C.* 445.

stood, that he dismissed the bill

(41) *Ante*, 171. In that case the time was five years; during which she acted under the will; and being sole executrix, and the trustees not acting, she received the rents and profits. The *Lord Chancellor* desired to be under-

upon the particular circumstances, that the fund was a free fund from the beginning; and, that there was no suggestion, that the estate was in such a situation as to render it doubtful, what the result would be.

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Montague shall never bind any other, where there is the least difference between them (42). In *Boyn-ton v. Boynton* nothing was done; but she had said, she would elect. Here she has acted for three years together; and taken the legacy; and submitted to the will. If any case of ignorance of her right was made out, that would be different.

BULLER, J.

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If the argument for the Defendant holds, a single payment would have bound her: but the point is, whether she had full knowledge of the circumstances of the testator, and of her own *rights. I think, there was a case before me about two years ago at *Lincoln's Inn Hall*, which went much beyond this. If she had acted with full knowledge, she should not afterwards deny it: but after three years only I cannot say, she is not entitled. The legacy of 100*l.* and what she has received from the annuity must be accounted for (43).

By consent nothing was said about interest.

(42) See the observations of *Storie*, 2 *Ves. & Bea.* 222. Lord the Lord Chancellor upon that *Dorchester v. Earl of Effingham*, case, ante, in *Butricke v. Broad-Coop.* 319. *Miall v. Brain*, *hurst*, 171. 4 *Madd.* 119. *Butcher v. Kemp*,

(43) See the note, ante, 259; 5 *Madd.* 61. *Roberts v. Smith*, post, *French v. Davies*, Vol. II, 1 *Sim. & Stu.* 513. 1 *Ball & Beat.* 572. *Strahan v. Sutton*, III, 249. 23. Upon election generally, see *Couch v. Stratton*, IV, 391. post, *Blake v. Bunbury*, *Finch v. Smith v. Smith*, V, 189. *Greato-Finch*, 514, 534, and the notes *rex v. Cury*, VI, 615. *Chalmers v.* in pages 523, 7.

FOUNTAIN v. PELLET.

1791.

June 1st.

BULLER, J. for the Lord CHANCELLOR.

Testator devised his estate upon trust, that his mansion-house,

park, garden, &c. pictures, plate, furniture, &c. (to go as heir-looms) should by the trustee "be kept in hand, and in good order and repair," till all incumbrances paid: upon farther trust to permit testator's daughter "to have,

SIR NICHOLAS CAREY devised all his estates in *England* and *America* to the Defendant upon trust to sell the estate in *America*; and, as to his estate in *England*, that his mansion-

mansion-house at *Beddington*, together with the park, gardens, out-houses, &c. and all the lands occupied with it, and then in his hands, (amounting to seventy acres) and all the pictures, plate, linen, and furniture, (which, he directed, should go with it as heir-looms) should by his said trustee "be kept in hand, and in good order and repair," till his estate should be discharged from all incumbrances; and not to be let to any person whatsoever: and upon farther trust to permit his daughter *Catherine Carey* "to have, hold, occupy, use, and enjoy" his said mansion-house, with the park, garden, &c. and all the pictures, plate, furniture, &c. for her life: then upon farther trust to lay out of the yearly rents and profits of all his estate in *England* all, his trustee should find necessary to keep his mansion-house, &c. in good repair; and then to pay his daughter an annuity of 600*l.* and to apply the surplus in discharging the incumbrances upon the estate; and he expressly excepted the mansion-house, &c. from the charges upon the estate. After the incumbrances should be paid, he limited the estate to *Fontaine* * with remainders over, with powers of leasing over all except his mansion-house, &c. which, he desired, those, who were to take his estate, should inherit, and also take his name and arms. He also gave 10,000*l.* to his

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"have, hold, occupy, use, and enjoy" his said mansion-house, park, garden, &c. pictures, plate, furniture, &c. for life: upon farther trust to lay out from rents and profits all he should think necessary to keep the mansion house, &c. in repair: then to pay the daughter an annuity of 600*l.* for life (for whom he also charged the estate with 10,000*l.*) and to apply the surplus in discharging the incumbrances, from which he excepted the mansion-house, &c. He gave the trustee 200*l.* a year above all charges; and after charges paid limited the estate over. The daughter occupied the house till her death: afterwards the trustee lived in it. The daughter held to have had an equitable life estate in the house, &c. as excepted from the general devise to the trustee: who therefore upon account was not allowed for rates and taxes paid, and expence of the garden defrayed by him during her life: but allowed for them afterwards, because under this will necessary for him to occupy either himself or by a servant. Allowed for necessary expence of procuring a thing to be done, which turned out to be reasonable though he might have come to the Court to see, whether it was proper. Not allowed for costs of a suit against the daughter voluntarily paid by him, even though she was entitled to them from the estate; nor for a park-keeper upon the trust estate, because used as his own servant.

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his daughter, charged upon the estate; and gave a power to the trustee to raise by mortgage what would be sufficient with the rents to pay off the charges. Then reciting, that his daughter's marriage could only bring disgrace upon her family on account of her great bodily infirmity, he directed, that, in case she should marry, she should lose all benefit under the will. He gave to the trustee 200*l.* a year over and above all his charges for his care and trouble.

Miss *Carey* occupied the mansion-house till 1796, when she died unmarried. Since that time the Defendant lived in the mansion-house. The incumbrances upon the estate were about 24,000*l.* The bill was brought by *Fountainé* for an account, and to be let into possession; and by a decree made in 1773 an account was directed; and it was ordered, that the Defendant should be charged with all, he made, or might have made without wilful default; but that he should not be charged with rent for the mansion-house, &c. nor with the produce of the garden used in his own family; but if he had made any profit by the sale of it, he was to be charged with that: and it was declared, that the Plaintiff was not yet entitled to be let into possession; but that the house, park, &c. should still be kept in repair by the trustee. Exceptions were taken to the report by the Defendant: first because he was not allowed for the rates and taxes paid by him both during the life of Miss *Carey* and since her death; as to which the question was, whether he was to be considered as occupier, and so liable to pay them, and to charge them upon the estate during either or both of those periods.

Another exception was, that the Defendant was not allowed for the expence of cultivating the garden during the same periods.

Solicitor General and Mr. *Mitford*, for the exceptions.

As to the first period, during the life of Miss *Carey*, the Master has disallowed these payments upon the idea, that the

[*339] * Defendant ought to have called upon her for what he had so paid. The meaning of the testator was, that the trustee, to whom the first part of the will gave the whole legal estate, should be the occupier; not Miss *Carey*, who, he intended, should

should have her life interest clear of all expence whatsoever. There was no limitation to her issue, because he wished her not to have any. With 600*l.* a year she could not be the occupier of so large a mansion-house, park, &c. If the Defendant was occupier, he was the person legally chargeable; and he had no equity to call upon her to repay him what he had so paid. If he could, it could only be in a Court of Equity; or, if a Court of Law would entertain an action for money paid to her use; it would be an equitable action, and subject to the same rules. Till all the charges should be paid, testator has expressly stated his wish, that the mansion-house should be kept in hand by the trustee; and therefore gave his daughter an annuity for her support with permission to live in the house: but he intended, that all the writings, &c. which it would be the duty of the tenant to look to, should remain with the trustee, who was therefore the tenant, and liable to pay all these taxes and outgoings, and therefore ought to be allowed them. As to the time subsequent to the death of Miss *Carey*, the bill insisted, that the Defendant should pay rent for the mansion-house since that time; and, that the Plaintiff should be let into possession: but his possession is postponed by the decree; and according to that Defendant is not to pay rent; nor to be charged with the consumption of the produce of the garden in his own family.

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Mr. *Mansfield*, for the report.

These exceptions come on after a great lapse of time. Miss *Carey* has given by will all her fortune to this Defendant; by which he will get the 10,000*l.* charged upon the estate. Ever since her death he has been lord and owner of this estate. There was no necessity for his being tenant of the house after her death: but he chose to be so: and the only question is, whether he shall not pay the common taxes and expences of the place. That provision, that it shall be kept in hand, applies to the time, when Miss *Carey* should be dead. The testator only meant, that these premises should be kept in proper repair, as his other estates; not, that the taxes, and expence of cultivating the garden should be paid out of this fund. This place is within ten miles of *London*; and with a little management such a garden would not only defray

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defray the expence of its cultivation, but even afford considerable profit. The trust of the house, &c. to Miss *Carey* was the first trust: and the words used gave her an equitable estate, if any words can. "To have, hold, use, occupy, and enjoy," are the very words of a legal estate for life: and it would have been a clear legal estate only for the word "trust." The testator might have exonerated her from taxes: but his intention must have been very clear for that. That part of the will, which they insist upon, is recital; and includes in the same clause with the mansion-house, &c. lands then in his own occupation. These are not mentioned in the devising part, which cannot be affected by the recital. Upon the whole, though she was to pay no rent, nor to be at the expence of repairs, there is nothing to put her in a different situation from that of any other tenant for life; and 600*l.* a year with the interest of 10,000*l.* was a sufficient income. As to the time during which Defendant has been actually occupier; this estate is an auxiliary fund for debts. He has not paid a mortgage upon it. He ought to have made it as productive a fund as possible. If he chose to become tenant, and is not by the decree to be charged with rent for it, he ought at least to be charged with the common taxes of an occupier.

#### Reply.

This is what the Plaintiff calls recital; "and it is also my will, that all the pictures, plate, &c. be annexed to the mansion-house, and that they be kept in hand, &c." That is a devising part: and controls all the subsequent devises; and upon that clause the Court has said, the Plaintiff is not entitled to the possession of the estate. From the outset of the will the trustee is directed from the death of the testator and till the debts are paid, to keep it in hand; which controls all the subsequent interests to Miss *Carey* and the other persons; and makes the trustee actually occupier. As to the latter period, it is taking the profits from him, and charging him with taxes on account of those profits.

#### BULLER, J.

The observations, Mr. *Mansfield* set out with, upon the circumstances of this case are strongly founded: for here in

1791 are exceptions taken to a report under a decree made in 1773. It is no credit to the Court: but it does not appear, who caused the delay; and it cannot influence the decision of the case. This will certainly is not accurate. That first part, which on one side is called a recital, on the other the devising part, does direct expressly, that the house, &c. shall be kept in hand by the trustee. When in a subsequent part he says, his daughter is to occupy part of it, it is inconsistent; for those words are too express to admit a doubt as to the interest, he took in the limitation. The point is, whether under the words of the devise to the trustee to permit his daughter to have, hold, occupy, use, and enjoy the mansion house, park, garden, together with the use of his plate, furniture, &c. for life, she had only a licence, or an equitable interest in the house, park, &c. for life; and the words are so strong to give her an equitable interest for life, that notwithstanding the perplexity arising from comparing that with the former part it is the true and only construction. If it was only a licence to her, it naturally follows, that he might continue in the house at the same time, and do what he pleased in it: but it is clear, the testator did not intend that, for he has given to her the general and absolute use of the whole house, park, garden, plate, furniture, &c. Therefore to make it consistent I must consider this as an exception out of the general devise to the trustee to be kept in hand, &c. It is the more probable, that this was his intention, because after the first clause directing the trustee to keep in hand, &c. it makes part of the same sentence, that he is not to let to any one. The trustee's hands are tied up as to that: but it was competent to the testator himself to say, that any person might occupy the house, &c. and he has said that for his daughter. But another part of the will is to be considered even as during the life of *Miss Carey*; for in the first devise the testator has also given all the lands occupied with the mansion-house, and then in his hands. Those the trustee is not to let, but is to make profit of; and is answerable for the profits of those seventy acres only. They are not given to *Miss Carey*; and therefore are in different circumstances; and he is to be considered as acting only in execution of his trust as to that; and therefore

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therefore it necessarily follows, that he is entitled to an allowance in respect of those seventy acres.

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Mr. *Mansfield* here informed the Court, that those seventy acres had been let even during the life of Miss *Carey*, who was charged with the rent; that the trustee had \*accounted for the rent; and that there was no exception as to that.

BULLER, J.

If they were let, he acted directly contrary to the will. They were in fact let; and he has accounted for the rent; and the person occupying is to pay the rates and taxes. But there is no exception as to that. Therefore as far as the exception relates to the rates and taxes during the life of Miss *Carey*, it must be disallowed. Then the next question is as to the time subsequent to her death: and I think, he ought to be allowed for that time. Consider, whether it was necessary, that the house should be occupied or not. I think, the trustee was bound by this will so far to occupy the house, that he must be liable to rates and taxes. He was required to take care of the furniture, pictures, plate, &c. therefore some person, perhaps only a servant, must have resided there; and if only a servant, the property would have been liable to the rates and taxes paid, and which the trustee claims. As to the intention of the testator; much is to be collected from the nature of the property, and the character in which the Defendant stands. He is merely as a trustee, and steward. I rather think, he had been steward to the testator; and therefore it is impossible to suppose, the testator meant to throw any personal burthen or charge upon him. £200 a year was given him as a salary for his trouble and care in executing the trust; and if his situation was not beyond the ordinary case of a steward, to make him pay the rates and taxes of this large house would be much to take out of that salary; and probably as much, as any rent he could have paid for any house, he might live in; for it appears by the report, that they amounted to 50*l.* a year; therefore the testator could not intend that charge. The decree has gone far to decide that by directing, that he should have what garden produce, he could consume  
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in his own family, without paying any thing for it. According to that construction of the will he is not to be charged; but to have his salary clear. Therefore the exception as to the rates and taxes subsequent to the death of Miss *Carey* must be allowed; and as to the previous time disallowed.

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The second exception was not farther argued, depending upon the same principle.

The third exception was, that the Master had not allowed the sum of 9*l.* 15*s.* paid by the Defendant to a Solicitor for the expence of procuring a landlord to take up the lease of a house, that it might not be a burthen upon the estate, in consideration of a sum of money paid to him by the Defendant; which consideration money was allowed by the Master.

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For the report it was said, he ought to have come to the Court for this allowance.

Fourth exception: that the Master had not allowed a sum of 26*l.* paid by the Defendant to a Solicitor for costs of a suit brought against Miss *Carey*; which, it was insisted for the Defendant, she had incurred in the character of trustee for the devisee of this estate; and that therefore they ought to be allowed.

For the report it was said, that, as there was no adjudication of costs to her by the Court, the Master would not have been justified in allowing them.

The fifth exception for not allowing the Defendant for a park-keeper was resisted; as he had used the same person as his own servant; viz. as his huntsman, and in other capacities.

BULLER, J.

As to the third exception, the Master has allowed the consideration money paid to the landlord; and this is a necessary expence in procuring that to be done. Though he might have come to the Court to see, whether it was proper, yet if it turns out to have been reasonable, he shall have it; therefore



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therefore allow that exception. As to the fourth, I think, he has gone too far; for those costs would have been due to Miss *Carey*, if to any one. She never took any step about it; and he has put himself in her place in order to charge the estate. That is too much; and must be disallowed. As to the fifth, if he used the park-keeper as his servant, he must pay him: disallow that also.

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June 3d, 28th.

## NOURSE v. FINCH.

BULLER, J., for the Lord CHANCELLOR.

Residue unbequeathed: codicil disposing of it, but with blanks for names, &c. not filled up, and unexecuted, found with the will: and contradictory evidence of intent: executor, having a specific legacy, trustee for the next of kin.

SIR CHARLES NOURSE upon the 18th of *February*, 1789, devised in the following manner: "As to all my worldly estate, with which it has pleased God to bless me, I give and bequeath as follows:" After disposing of a great deal of property by way of specific legacies to several persons he gave to Miss *Finch* "out of the true regard and affection I have for her" the house he dwelt in, and another of which he was seised in fee, to her, her heirs and assigns for ever, provided she did not marry, but with remainder over if she should. He also gave her "all and singular the furniture, linen, plate, glasses, china, carriage, books, (with a few exceptions) jewels, watches, liquors, wearing apparel, cash in the house, and all other things now used in the premises to her, her executors, administrators, and assigns," provided she did not marry; but, if she should marry, they were given over. He gave 15,000*l.* stock to trustees upon trust to permit her and her assigns to have the interest and dividends for her life upon the same condition, that she should continue single, otherwise to go over. Upon the same condition also he gave 2500*l.* due to him upon mortgage of some tolls to trustees upon trust to permit her and her assigns to receive the interest for her life, with remainder over upon her marriage. He gave her 1100*l.* secured to him by the Commissioners of the *Oxford* market with the arrears, to dispose of as she should think fit. He then gave 4000*l.* stock to trustees upon trust for his sister for life: to Dr. *Chapman* and another being trustees in his will 100*l.* each for their trouble; and directed,

directed, that they should not be chargeable with more, than they should actually receive, and that they should retain their expences. He made Miss *Finch*, who was a relation, his sole executrix; and directed the legacies to be paid within twelve months after his decease, or as much sooner as might be convenient to her. There was no residuary clause. The testator died the \*19th of *April* following. After his death a sketch of a codicil was found wrapt up with the will, but not executed; nor were the blanks, which had been left both for persons and sums, filled up. It was in the following form: “Whereas I have not in my will disposed of the residue, “I give out of the said residue

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“and all the residue”

The bill was brought by Mrs. *Nourse*, the only sister of the testator, claiming as sole next of kin a residue of about 8000*l.* as undisposed of. The Plaintiff had besides the legacy given to her 250*l.* a year for life; and was 84 years of age at the execution of the will. They went into evidence on both sides.


The evidence for the Plaintiff consisted of the depositions of *John* and *Thomas Walker*, who were brothers, and attornies of character, and friends of the testator. *John Walker* lived in or near *Oxford*, which was the place of the testator's residence: *Thomas* lived at *Woodstock*. Their evidence was to the following effect. “*John Walker* prepared the will from the “instructions of the testator given about the 10th or 11th of “*February*, 1789; at which time the deponent *John* observed, “that the residue was not disposed of; to which the testator “replied, that he meant to dispose of it by a codicil of his “own making. By the testator's directions *John* sent the will “to his brother *Thomas* to be looked over by him. On the “18th of *February* the testator called again upon *John* in order “to execute his will, when *John* again observed to him, that “the residue was not disposed of, and advised him to execute “a codicil, as it would prevent a Chancery suit between his “executrix and next of kin, which otherwise might happen: “testator replied, that he had provided for all the grand “objects of his bounty by his will, and would make a codicil “in

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“ in his own hand writing. In the beginning of *March*, 1789,
 “ the testator sent word to *Thomas Walker*, that he would
 “ come over and dine with him, as he wanted to consult him.
 “ The testator came accordingly, and brought his will with
 “ him, and asked *Thomas*, what he thought of it. *Thomas*
 “ having read it said, he thought it very proper; but observed,
 “ that there was no disposition of the residue; but that, as
 “ nearly 100,000*l.* was given away, perhaps that would exhaust
 “ the whole, and there would be no residue: * the testator
 “ replied, that there was a residue of 7000*l.* or 8000*l.* that he
 “ intended to dispose of that by a codicil in his own hand
 “ writing; but as he did not know how to frame one, he de-
 “ sired *Thomas* to send a sketch of a codicil to him; and
 “ added, that he had some god-children and other relations;
 “ and that *Dr. Willis* was as nearly related to him upon the
 “ mother's side, as those provided for by his will were upon
 “ the father's side. He also mentioned a charitable institution,
 “ which he had in view for the benefit of decayed tradesmen:
 “ but said, he did not feel himself equal to the execution of
 “ such a plan at present, and that he had provided for all the
 “ principal objects of his bounty by his will, and must defer
 “ the rest to another opportunity. *Thomas* then suggested to
 “ him, that as he had been at the head of his profession in the
 “ county, it would be honourable in him, and was expected
 “ from him, to give something to the County Hospital; upon
 “ which the testator thanked him for that suggestion, and
 “ said, it had escaped him, and that he would do something
 “ handsome for the Hospital by his codicil; and at parting
 “ said ‘ *Walker*, I promise you not to forget this.’ *Thomas*,
 “ being asked by the testator to whom the residue would go if
 “ not disposed of, answered, that ‘ it would go to his sister.’
 “ *Thomas* was present with *Dr. Chapman*, Mr. and Miss *Finch*,
 “ when the will was opened; and, being asked how the residue
 “ would go, told them, ‘ it would go to the Plaintiff as sole
 “ next of kin.’ In his cross-examination he said, that to the
 “ best of his knowledge and belief that was his answer.
 “ Upon that answer the Defendant observing that the Plain-
 “ tiff did not expect that, *Thomas* advised them to apply
 “ to her immediately, as it would prevent all disputes.”

The evidence for the Defendant consisted of the depositions of *Herbert Croft* a clergyman, who had formerly been at the bar; of *Richard Finch* brother of the Defendant, and of *Dr. Chapman*, Vice Chancellor of *Oxford*, all of whom were friends of the testator.

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Herbert Croft's evidence——“ The testator in several conversations with the deponent previous to the will expressed great regard for the Defendant, saying that she deserved very well at his hands; that he should give her at least 30,000*l.* and could not do enough for her, she was so attentive to him, particularly in his illness. The testator expressed great anxiety * least any unworthy person should marry her on account of the fortune, he should give her; and asked, how that could be prevented. Deponent advised him to frame his will so as to give her the residue, which, he said, he would do. While the deponent was in *London*, the testator wrote to inform him, that he had followed the deponent's advice, and taken all the care, he could, that *Miss Finch should have the residue and not be made a prey of*, or that she *should not be made a prey of*; but the deponent having destroyed the letter could not tell, which of those phrases was used. On the 6th of *March* the deponent returned from *London* to *Oxford*; and the testator in conversations with him after the will about the end of *March* said, he was not satisfied with his will himself, though he hoped, others would be; for *Miss Finch*, though she would have the residue, would not have as much, as she deserved: that he had been much troubled with a doubt, whether she would have the residue, which he always intended for the reasons this deponent knew, but that he was contented and happy, because he had been over to *Woodstock*, and was assured, that nothing would prevent her from having the residue: that if he did not leave a legacy to the Hospital, as had been desired, it would be for the sake of her residue, which, he wished, was much more; that he was happy at being certain that his will was made, as he intended, and that every thing real not disposed of would go to his sister, and every thing personal to *Miss Finch* without any person being able to calculate her property: that by *Miss Finch's*
 “ desire

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“ desire he had written, or sent, or done both, to his sister  
 “ to inform her of what he had left her by his will, and to  
 “ offer more if she was not satisfied; but that she said, she  
 “ was satisfied; and that it would be strange, if she was not,  
 “ as she had 250*l.* a year, besides what she had by the will,  
 “ and was 84 years of age.”

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*Richard Finch's* evidence——“ A day or two after the exe-  
 “ cution of the will the testator told the deponent, that he  
 “ had a residue undisposed of, and expressed a wish to know,  
 “ how it would go if undisposed of, saying he wished to esta-  
 “ blish a charitable foundation, and to give something to the  
 “ *Radcliffe Infirmary*. By his desire the deponent went to  
 “ the Plaintiff, to inform her of what the testator had done  
 “ for her, and to offer her 2000, 3000, 4000*l.* or any sum she  
 “ pleased in addition; which offer she refused, saying she was  
 “ perfectly satisfied \*with what she had, and that any increase  
 “ would only be a burthen to her; and the testator told the  
 “ deponent, that she had before given him personally the  
 “ same refusal. A few days afterwards the deponent was in-  
 “ formed by the testator, that he had been to *Thomas Walker*  
 “ to know, to whom the residue would go if undisposed of;  
 “ and that *Thomas Walker* had cleared up his doubts, and  
 “ that the residue of his personal would go to his executrix;  
 “ and then added, ‘ that is your sister; which deponent did  
 “ not know before.’ A day or two after deponent called upon  
 “ the testator, and found him with pen and ink, as if preparing  
 “ to write; and that the Defendant coming in said to him, ‘ I  
 “ am afraid, you have not written, as you said you would;’  
 “ to which the testator answered, ‘ Poo, damn it; the less I  
 “ do, the better it will be for you.’ The deponent was pre-  
 “ sent with *Dr. Chapman* and *Thomas Walker* at the opening  
 “ of the will; and the latter, being asked who would have  
 “ the surplus, said, the Defendant as executrix, except the  
 “ freehold, which would go to the heir at law.”

*Dr. Chapman* confirmed the last part of *Finch's* evidence;  
 and proved, that in the conversation at the opening of the  
 will *Thomas Walker* said, he did not know, the *Finchs* were  
 so nearly related to the testator till lately, when upon his  
 observing how handsomely the testator had done for that  
 family,

family, he said, he did not know, whether they were not as nearly related to him as any except his sister.

Upon this case the question was, whether the Plaintiff as sole next of kin, or the Defendant as sole executrix, was entitled to the unbequeathed residue.

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Mr. *Mansfield*, Mr. *Graham*, and Mr. *Abbot*, for the Plaintiff.

The executrix having a legacy, the Plaintiff is entitled by the common rule of the Court. Most of the legacies given to the Defendant would bring this case within that of the *Duchess of Beaufort*, 1 *P. Will.* 114, &c. where interests given for life were considered as given merely for the sake of the limitation over; but the legacy given in this case to the Defendant out and out takes it out of those cases, and brings it within *Middleton v. Spicer*, 1 *Bro. Ch. Ca.* 201 and other cases, in which an executor having a legacy was considered as trustee for the next of kin. \* In these cases the Court always takes the province, which would belong to a jury, by determining upon the presumption, which is not to be repelled by slight evidence; though if it appears clearly, that the testator knew and intended, that the executor should have the residue, that will be sufficient to rebut the equity for the next of kin. The testator has mentioned in the most distinct manner his intention to provide for the Defendant, who had lived in his family for twenty years. He did not think it for her happiness, that any person should be induced to marry her for her fortune; therefore except two legacies, one of which is given expressly for the purpose of keeping a carriage, he has given nothing to her but upon condition of living single: then it is hard to think, he intended to give her so large a sum as 8000*l.* absolutely; for that would contradict the whole tenor of the will. The principal witness for the Defendant represents in all his evidence, that her interests were so restrained, on purpose that the property, he did give, should not be the means of her marrying to disadvantage. It appears, he knew he had not made a complete disposition of his fortune. *John Walker's* evidence is very material; for it resists the whole of the defence; namely, that the testator was apprised, that the effect of not disposing of the residue would be, that the executrix

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executrix would take beneficially. If the *Walkers* both being men of business had told the testator, that that would be the consequence, that would not have escaped their memory. The words of *John*, that a codicil might prevent a Chancery suit between his executrix and next of kin, gave him to understand, that it was a matter of doubt at least. He could not therefore have said, as is pretended, that he knew the consequence; but, not being apprised how the law was, was sent away in perfect doubt upon that head. *Croft's* memory is not very accurate, as appears from his evidence. If that letter to him only expressed, that the testator had taken care, the Defendant should not be made a prey of, that applies to the condition not to marry: but if it expressed what, he very imperfectly supposes, he recollects, it would be making her an object of prey: for the law is certain enough, to induce people to address her on account of the residue. The single circumstance of leaving a codicil though unexecuted is a strong case to shew, he did not mean to give the residue to his executrix; *Bishop of Cloyne v. Young*, 2 *Ves.* 91.

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Solicitor General, Mr. *Mitford*, and Mr. *Richards*, for Defendant.

This bill is founded upon a principle very familiar to the Court; that where an executor has a legacy, an inference is raised to exclude him from the surplus, upon the idea that he, to whom part is given, was not intended to have the whole. I do not dispute that principle, though I will say the authority of it has been wearing away during the greatest part of the last century. A vast number of the interests given to the Defendant would have no effect because limited; but there is an absolute bequest of a specific fund, namely, the mortgage upon the *Oxford* market. But both from the will and extrinsic evidence we find, he did not intend to exclude the executrix. The Plaintiff being 84 years of age at the date of the will, and having refused the additional legacy offered, cannot succeed upon the ground of intention in him. But it is said, if there is no evidence of his intention, yet the Plaintiff is entitled. As to that there is a material difference, where the legal property is in the executor between a positive intention in favour of the next of kin, and an inference in favour of the next of kin because the testator did

did not intend the executor to have it. Circumstances of relation and connexion have had great influence in cases of this kind, which are upon questions of fact as to the intention. The testator's regard for the Defendant appears by the evidence, and the words of the will, and the reference of payment of the legacies to her convenience. The introductory part of the will states, that he means to dispose of the whole of his worldly estate. That, I know, is not decisive, though not immaterial to state. The testator at the execution of the will expressing no intention about the residue, *John Walker* stated to him the effect of not making a disposition of it; and then, he said, he would make a codicil. What, he meant, was not to trust *John* upon the subject; but it not being his intention to give it to the next of kin, but that the executrix should take it, he went to inquire from *Thomas Walker*, in whom he seems to have had much more confidence than in his brother, what would be the effect. It is clear from the evidence, that the intention must have been, that, if there was no codicil, the executrix should take it; and this must have been the idea of *Thomas Walker* himself; for two of the witnesses swear, that at the opening of the will he said, "as there is no codicil, the residue will belong to the executrix;" * giving his reason, viz. "as executrix; except the freehold, which will go to the heir at law." In his cross examination he qualifies his answer in favour of the Plaintiff in his direct examination by saying, that to the best of his knowledge and belief that was his answer: which is not so strong. Either these two respectable witnesses for the Defendant must be supposed to be guilty of perjury, or they must have grossly mistaken him, if he did not answer, as they say, or his language must be very inaccurate; and if so, perhaps it was so in his conversation with the testator. It is likely, that *Dr. Chapman*, who asked the question, took particular notice of the answer. What *Walker* said to the testator must have been "it is necessary for you to make a codicil, if you mean to give a legacy to the Hospital; if not, your present will will do according to your intention." Perhaps it will be asked, why he did not put in a gift of the residue, when informed that it might become the subject of dispute upon that very point. He went to consult *Thomas Walker* not

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having a sufficient reliance upon *John*. If *Thomas's* language was not, as I have stated, it is clear, the testator must have understood him so: and if so, his intention being upon the 18th of *February* to give this to his executrix, and being satisfied that his will would do for that, that is sufficient, notwithstanding what *John* said, and any intention dropped in favour of the Hospital. The whole comes to this: a doubt was suggested, whether there was not room for dispute, whether properly or improperly is the same thing; for if the evidence proves only, that his difficulty was not, who should take, but what without a farther disposition would be the effect of his will, to give his executrix what he meant she should have, and that he was satisfied, that it would be sufficient for that purpose, there was no occasion to alter it, and it is a case, which will repel the equity. The declaration that he was contented and happy, because he had been assured at *Woodstock*, that nothing could prevent the Defendant from having the residue, could only have been made upon *Walker's* telling him that, or his understanding it in that sense. His intention to give his sister what sum, she would name, shews, he did not mean to give her the residue. As to the executrix being barred by the legacy which is given to her absolutely, there is a distinction between a specific and a general legacy for this purpose. In *Bowker v. Hunter*, 1 Bro. Ch. Ca. 328, Lord *Loughborough* took particular notice of the case of specific bequests, and observed, that in *Southcot v. Watson*, 3 Atk. 226, that distinction \*did not prevail: but in my note of that case Lord *Loughborough* says, it is rather a doubtful point and not yet determined; and *Lawson v. Lawson*, 7 Bro. P. C. 511, is quite the other way; which decision will have great weight; as it was in the House of Lords, and was a case, in which one of the greatest men particularly exerted himself. In that case the decision was in favour of the executrix. *Hylton Lawson* husband of the appellant charged with debts, legacies, and funeral expences his real and personal estate, except 300*l.* which he had received as part of his wife's fortune, and which was then lent upon bond; that sum he gave to the appellant, directing that it should go entire to her: he also gave her an annuity out of his copyhold estate, and all her wearing apparel, watches, &c. and after giving  
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some legacies made her sole executrix. It was said, this 300*l.* was her own property: but that was not so, for it was received by him as part of her fortune; and though he meant to give it back as part of her fortune, yet it was his property, and therefore a specific legacy. As to the other things he conceived, he had some power over them, and meant to do something with them, which, he conceived, he had not done by appointing her executrix; or the construction must be this; that where a man makes a disposition, which is in its nature specific, the intent is, that though the person, to whom he means the residue shall go, would take these particular legacies, he should take them in a better condition, than he would the residue, namely, as specific bequests not charged with debts. That case shews, the law was not against the distinction at that time, however Lord *Hardwicke* might have understood it before. The law cannot be according to his opinion in *Southcot v. Watson*, because the case proceeds upon the idea of the absurdity of giving all and some: so it is, in case of a pecuniary legacy, but otherwise in case of a specific legacy. It is common to leave to a wife household goods, &c. and to make her residuary legatee. The advantage of it is, that, if the personal estate is insufficient for the charges, yet she shall have these articles secure. Therefore the reasoning in case of a pecuniary legacy does not apply to the case of a specific legacy, which is not inconsistent with an intention, that the specific legatee shall take the residue, because the gift of the specific legacy is to put the legatee in a favourable situation, in which that legatee could not be, if to take it as part of the residue. So here the testator intended the Defendant to take this 1100*l.* not charged with debts or pecuniary legacies, \*but as a specific bequest; and upon an equal footing with the other specific legatees. This is one of many cases, which shew, how wrong it is to admit parol evidence. Words easily admit of a colour. In point of law the executor is entitled; and, as the *Lord Chancellor* said in *Bowker v. Hunter*, 1 Bro. C. C. 328, the law is, that the executor shall take every thing not disposed of; and so it must be, unless there is irresistible evidence of a contrary intent; unless there is, the law must prevail; and can that be said to be the case here? This is taken out of the case of the *Bishop of Cloyne v. Young*, because no codicil

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was ever made. Nothing was said about a residuary clause. Before the will and at the time of executing it he intended to give the residue to his executrix. If he had changed that intention, he would have said so, and there must be evidence to shew it; but, though he talks of giving some more legacies, he says nothing about the residue. Can the general rule be destroyed, because he intended to lessen the residue? Can it be said that, because he intended to give some part of it to different persons, therefore the next of kin shall have it? Why did not the *Walkers*, who were so anxious about it, advise him to put in a clause saying, that he intended to dispose of the residue by a codicil, instances of which I have often seen. Suppose it appears, that he did not intend it for the next of kin, though it does not appear, that he intended it for the executor, the law must prevail in that case: *Brasbridge v. Woodroffe*, 2 *Atk.* 68. In that case unequal legacies formed one ground of the decision; but there was evidence, that both before and after the will the testator intended, the next of kin should not have it; and the *Master of the Rolls* said, that, if he gave it to the next of kin he should give it contrary to the intention of the testator; and that it is enough, if the Court is satisfied, that the next of kin is not to have it; for if that appears to exclude the next of kin, the executor has it of course. But this case goes farther; for an intent appears in favor of the executrix. The result of the Plaintiff's evidence is, not that he did not intend the Defendant should take the residue as executrix, but that he intended to give future legacies: that is all, that is implied in that conversation with *Thomas Walker*: not that he meant to give away the residue as residue. He intended clearly to give 500*l.* or some such legacy to the Hospital. *John Walker's* expression, that a codicil would prevent a Chancery suit between his executrix and next of kin, confirms the Defendant's evidence, that \*he did conceive, that his appointment of the Defendant as executrix would give her the residue, unless something was done to prevent it; or at least that a doubt had been suggested to him upon that; which doubt *John Walker* did not put in any thing to remove; and the expressions of the testator are positive, that he intended by making the Defendant executrix to give her the residue; that he had doubted about it; but rested satisfied, that

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that she should take it, and died under that impression. It is surprising, that *Thomas Walker* does not seem to recollect, that he had seen the will, before the testator brought it to him. From *Croft's* evidence it appears also, that the testator declared, that the appointment of executrix would according to the construction, which (he was informed) would be put upon his will, give the Defendant his residue, though the idea of giving some charitable legacies was still floating in his mind; and that he said, if he did not give them, it would be for the sake of the Defendant's residue, &c. But supposing this was not his intention at the time of making his will, but that he formed his mind upon it afterwards, that is sufficient to support the Defendant's claim, who may read any parol evidence to shew, the Plaintiff is not entitled, though not to contradict the will. Suppose he had told his sister, that he would give her 1000*l.* if she would not claim an advantage, which, he understood, she might have by his will: that fact being proved would be sufficient. Upon the whole this is a case, in which it is extremely difficult to raise a trust even upon the will itself: nothing but that legacy of the mortgage upon the *Oxford* market would be sufficient; and that is distinguishable because specific. Then here is a clear legal right sought to be taken away by equity upon a presumed trust. That right must prevail, unless it is seen clearly, that his intention was contrary to it: but if it is clear, as in this case, only that it was not intended for the next of kin, where is her equity?

Reply.

That last question is easily answered. The next of kin are by the rules of the Court entitled, to what the testator has not disposed of, not because he intended it for the next of kin, but because he has made no disposition of it. They claim as in case of intestacy as to the subject claimed as equitable representatives of the deceased. The distinction set up between specific and pecuniary legacies is absurd; and was exploded in *Southcot v. \* Watson* by Lord *Hardwicke*, who in that case fully established the contrary. The true question is, whether the executrix as such is by force of the will entitled to the residue; which must depend, upon what the testator intended, when

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when he made his will. She must make out her title, to what she is to have, by his intention at the time of making the will; which was then complete. What happened afterwards, is not to the purpose. This falls in with Lord *Hardwicke's* reasoning in the *Bishop of Cloyne v. Young*. It appeared there, that at the time of making the will he intended to give the residue to somebody; and as one executor had no legacy, that was a strong case for their right. But it was decided against them, because he did not at the time mean to give the residue to them as executors; and what his intention afterwards might be, was nothing to the purpose. There is no proof here, that at the time of making the will the testator intended, the Defendant should take the residue as executrix: but that he did not intend it, is proved by her witnesses as well as those for the Plaintiff. *Thomas Walker's* evidence is most decisive; and it is more likely, that he should be accurate in his idea of the opinion, he gave upon a legal point, than the Defendant's witnesses; who, however respectable, could not be well acquainted with the subject. It was not a single question to *Walker*; but there was a long conversation; and different questions were put to him, as to what the law would be in such and such events. None of their evidence but that of *Croft* goes to any thing before the will. If fifty witnesses say, that after the will he intended this for the executrix, and was told, his will was sufficient for that purpose, yet if it is clear, that at the time of making the will he did not intend it for her, that will not do: but she must take by the will and his intention at that time. But it does not depend upon parol only and the fallibility of *Walker's* memory; for there is the fact of the codicil found wrapt up with the will. None of the cases put are like this but one; that is, where a man forbears to alter his will upon an assurance of the devisee, that he would give part to a third person; in that case the Court would decree the devisee to do so, because it would be a fraud.

BULLER, J. (after stating the material parts of the will.)

If the case stood upon the will itself, I should have no doubt after the decisions, which have taken place upon the subject, that the residue would belong to the next of kin as a resulting trust, and not to the executrix; for the different provisions

provisions for the Defendant, some for life, some in fee, some on condition that she should not marry, and one absolutely, which is the most material upon this question, because it has been determined, that the other limited interests would not do, afford a violent presumption, that at the time of making the will the testator intended nothing more for her, than what he had expressly and specifically given. It was argued for the Defendant, that the introduction of the will affords a different implication: but the general words "worldly estate" have no effect upon the question before us; because the question is not, whether there is an intestacy or not: therefore supposing she will take by the rule of law, yet if the rule of this Court has established, that a legacy shall exclude her, unless a contrary intention appears, the intention is to be collected from other circumstances, not from the general words. It was argued as to the manner, in which the legacies are to be paid, that she was a material object of the testator's consideration, because she was not to be called upon for payment of the legacies, till it should be convenient to her: but that has no weight upon this subject: for whether she was to have the residue or not, it was material to her not to be called upon, till she had time to look round, and to know how the property stood. It was next argued, that this 1100*l.* was a specific bequest; and therefore distinguishable from all the cases in which it has been held, that a legacy generally given will exclude an executor. No authority was cited to prove that distinction for the Defendant: but for the Plaintiff was cited *Southcot v. Watson*; which is a direct authority to shew, that no such distinction exists: and if the point was new, and no authority on either side, the reason of the thing is too plain to make any such distinction. The case standing thus upon the will, it is material to see what line this Court has laid down between the cases, where the executor shall be excluded and where not: and so long ago as the year 1709 the rule in equity was laid down, that if part is given to the executor, the surplus shall go to the next of kin. In another case also in 1734, *Mackworth v. Welling*, the rule was laid down thus: "where a legacy is particularly given and to come out of the residue, it is an exclusion from the residue." This was recognized in *Lawson v. Lawson*; though in that case the decision was for the executrix upon

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upon other grounds: and infinite pains were taken by Lord *Mansfield* not to stir the other cases, which he enumerated; and said, in some the legacy to the executor was expressed to be for care and pains, in others it was not for care and pains; in which latter cases the executor was to be looked upon as the other legatees; therefore upon the authority of that and all the other cases it is clear, that if a legacy is given generally to an executor, he shall be excluded from the residue, without strong proof that he was intended to take; and this 1100*l.* is such a legacy. This being the true construction of the will itself three other questions arise. First, whether parol evidence may be at all received. Secondly, if it may, within what limits it is to be confined. Thirdly, if to be received, what will be the effect of it in this case. As to the first, if this was a new question, I should reject the parol evidence *in toto*; for it is very mischievous, as has been stated by Mr. *Richards*; which is strengthened by Mr. *Mistford's* just observation, that words easily admit of a colour. But I sitting here for an hour perhaps, or a day, do not feel myself strong enough to overturn, what has been established by many cases; though if this turned wholly upon that, I should find great difficulty in agreeing to those cases. In a case of *ambiguitas latens* it may be admitted (44); so in a case of fraud; perhaps of ignorance or mistake: but it does not follow, that it ought to be allowed to prove the intent in any written paper; but that ought to be collected from the paper itself. The manner, in which it has crept into the Court, is plain from the allowed cases; and there are mistakes in some of them. Till *Foster v. Mount*, 1 *Vern.* 473, the executor took the whole. There 10*l.* being given to the executors *for their care* a residue of 5000*l.* was adjudged to belong to the next of kin. That case does not warrant the admission of parol evidence to prove intention; for the reference there was only to see, what the surplus was; and for that parol evidence is proper undoubtedly: both at law and in equity it must be received for that. But as that case was quoted in *Lawson v. Lawson*, it appears, that the executor himself made the will;

In what cases  
 parol evidence  
 admissible.

(44) Ante, in *Baugh v. Read*, and the note, in page 267. Post, 259; *Parsons v. Parsons*, 266; Vol. VI, 324; VII, 515.

will; and one of the cases in *P. Will.* (45) says *Foster v. Mount* was decided upon fraud; though there is a note by the editor, signifying that upon looking into the *Register* it did not appear to have been decided upon fraud: but Lord *Mansfield* in that case in the House of Lords conceived, that from the situation of the property and the character of \* the person, who drew the will in *Foster v. Mount*, fraud appeared (46). I agree, that in that case as a case of fraud there is no objection to the parol evidence: but that does not warrant it in cases of mere intention. Lord *Bacon* in his maxims says, averment shall not be of intention. So the law clearly is; and it would require very powerful reasons and authorities to induce me to say, the rule ought to be otherwise. In equity the Court has advanced by progressive steps in the admission of parol evidence beginning with cases of fraud; and lastly having admitted it in favour of the executor they were obliged upon a principle of common justice to admit it upon the other side also (47): and therefore it has happened by degrees, that in some cases a written will has been explained away by loose and vague parol evidence. Some of the cases shew, the Court have repented a little, of what they had done. In *Brown v. Selwin*, *For.* 240, there was a bequest of a residue to two executors, one of whom; *Selwin*, was indebted to the testator, and offered parol evidence to shew, that the testator had given him that debt. Lord *Talbot* says, “ I privately think, it was “ intended to give Mr. *Selwin* this debt: but I am not at “ liberty by private opinion to make a construction against the “ plain words of a will.” That case was carried to the House of

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(45) *Petit v. Smith*, 1 *P. Will.* 7. next of kin; and in a note to the fourth edition it is said to be

(46) Lord *Parker* of a contrary opinion, 1 *P. Will.* 550, the only case, in which parol evidence for the next of kin has been admitted. The Court (*Powis*, J.) said, that the parol evidence was not to be minded, attributed the imputation of because the legacy of 5*l.* to the fraud to the vehemence of Lord executor was followed by words declaring a trust: but that it is

(47) *Rachfield v. Careless*, 2 *P. Will.* 158. There was some such words. See *Williams v. Jones*, post, Vol. X, 77.

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of Lords; and they refused to let the evidence be read at all. In *Blinkhorne v. Feast*, 2 Ves. 27, Lord Hardwicke says, "there might have been another incidental question upon reading the parol evidence: and it is certain, that it has been read to rebut an equity arising from a resulting trust, as in *Littlebury v. Buckley* (48): but since *Brown v. Selwin*, I have been extremely tender of admitting it in questions of this kind; though I never doubted it, where it was to ascertain identity, or in case of collateral satisfaction, where there was a legacy by a father and afterwards a portion given." This is a strong opinion to shew, that Lord Hardwicke then thought, it would have been better, if parol evidence had not been introduced at all. The second question is, within what limits the evidence is to be confined. It consists of conversations with the testator before the will, at the time of making it, and afterwards: but as to all, except what passed at the time of making the will, the case of *the Duke of Rutland v. the Duchess of Rutland*, 2 P. Will. 209, in which the decree was founded upon the parol evidence, is directly against it: and Lord Macclesfield there said, that allowing parol evidence was extremely dangerous. If this is so, no evidence ought to be read except *John Walker's*; which shews, he did not then intend to give it to the executrix (49). If he ever intended to give it to the executrix, the time, when he executed the will, was the proper time; and but these three words "and residuary legatee" would have been sufficient. But though reminded of it at the time he was so far from intending to give it to the executrix, that his idea was to dispose of it in another way. This has been argued upon the ground, that it is not necessary to prove his intention to give it to the executrix, but that it is sufficient, if no intention appears for the next of kin: I do not agree to that: and the practice of this Court upon the subject proves the contrary. The Court has said, that it is a principle in equity, that if a legacy is given to an executor, that shall exclude him from the residue, unless an intent appears, that he shall take it. The terms of that rule prove, that it is essential for the executor to shew an intention in his favour; for the Court says, parol evidence may be admitted to rebut the equity; therefore, the material question is, whether an intention

(48) 2 Vern. 677.

(49) Post, Vol. XVIII, 148.

intention was proved for the executrix. One case was cited, *Brasbridge v. Woodroffe*, in which there is an expression, which bears out that argument for the executrix: but when we consider the effect of a particular expression, we must look at the facts of the case to see, whether that was really the point decided: and in that case the facts did not call for that determination: but it went upon the ground, that by the evidence there appeared an express intention for the executors (50); and the Court * having said they should not be excluded by unequal legacies, then came the question, whether he intended it for them or not. But I will suppose all the evidence admissible, and properly read in this case; and then see what will be the effect of it. The executrix, who, as is rightly stated by the *Solicitor General*, may begin with parol evidence, (for the other party must rest upon the will, unless she chooses to go into parol) has examined two witnesses. *Finch* states many general conversations; but particularly tells us, that within a day or two after making the will the testator told him, he had a residue undisposed of. Did he believe then that he had given it to the Defendant, or did he intend to do so? It is impossible he could then have thought, she was entitled

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(50) As this case is stated in *Atkyns* an intention in favour of the executors did not appear in any other way than by evidence of an intention, that the next of kin should not take. As an additional reason in support of the decision it may be urged, that it was not necessary for the executors to have recourse to evidence; for their legacies being unequal, and therefore not sufficient to exclude them, that was not a case for raising the presumption to defeat the legal title: and even if their legacies had been such as to exclude their legal title, and no evidence of intention in their favour, but only that the next of kin should not take, it would then have been a case of presumption on each side; and the presumption in favour of the executors, arising from the express intention, that the next of kin should not take, would have been much stronger than that in favour of the next of kin from the legacies given to the executors; or the next of kin must be considered as equitable representatives, claiming in a case of intestacy independently of the intention; and therefore must prevail over even an express intention against them. See *Pickering v. Lord Stamford*, post, Vol. III, 332, 492.

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entitled to it as by his gift; for he expressly said, he had not disposed of it; and then wished to know, how it would go if not disposed of; and talked of another intention, viz. of establishing a charity; and sent that message to his sister, and at a subsequent period said to *Finch*, the witness, that he had been at *Walker's* to ask, to whom it would go. So *Croft* says; and that though she would have the residue, he had not given her as much, as she deserved. The utmost extent of this is, that somebody told him afterwards, that it would go to the executrix. The evidence of *Croft* as to his advice to the testator is very loose and unsatisfactory. I wish, he had told us the very words, he used; and I cannot help supposing, as he was bred to the bar, that he advised him to make her residuary legatee; and that he told him how he was to give it so as to enable her to take without pointing out in the will the amount of her fortune; and did not leave him to find out, how he was to do that. If he did so, it appears, that the testator did not follow his advice, as he said, he would, but that of others. But says he, "the testator did some time after write to me, that he had followed my advice, and taken care that she should *have the residue*, and *not be made a prey of*; or, in these terms, that she should *not be made a prey of*." The expressions are very different; and when he cannot say, which phrase was used, I am \* not at liberty to suppose, it was the strongest, when the latter phrase is applicable to the conversation between them: for by his evidence the great object was to provide for her, so that no person should be induced to marry her on account of her property; and by giving the principal part in that limited way he was taking that caution, which he mentions to *Croft*. It appears also from *Croft's* evidence, that the intention to give the surplus one way or other was not a former design of the testator at the moment of making the will; for afterwards in *March* the testator told him, he was not satisfied with his will, though he hoped, others would be; and that he was much troubled about the residue. The question was, what would become of it, if he did not give it, Where he says, that all the real undisposed of would go to his sister, and all the personal to his executrix, he again treats that part of his property as undisposed of; and then  
 it

it follows pretty much of course, that his next of kin must have it. Then consider the evidence for the Plaintiff: the two *Walkers* were men of business: to them he applies, not to the witnesses for the Defendant, to know how he shall dispose of his property. One swears, he told him upon receiving instructions for the will, and when it was executed, that the surplus was not disposed of; and therefore it is clear, he did not mean, it should go either to one or the other, but that he meant to dispose of it himself by a codicil: and it is material, as was observed by Mr. *Mansfield*, that in this case there is something more than parol evidence only; namely, the sketch of the codicil found wrapt up with the will. Therefore the evidence for the Plaintiff is much stronger; first, on account of the relation between the Defendant and one of her principal witnesses; next it is clear from *Thomas Walker's* evidence, that he intended at the time to give the remainder to different objects; and talked of other relations as near to him as those provided for by the will; and also said, he had provided for all the grand objects of his bounty by his will, and must defer the rest to another opportunity; which is strong to shew, he did not mean, they should take more, than was expressly given. Therefore even upon the parol evidence it is in favour of the Plaintiff; and no intention is made out to give it to the executrix; and so either way, upon the will or the evidence, the Plaintiff is entitled as next of kin. Therefore there must be an account: but the costs must come out of the surplus, for giving that to the Plaintiff I cannot give her the costs.

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Mr. *Mansfield*, for the Plaintiff

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Did not dispute that as to the costs of the account; but objected as to the costs of the suit, that there was no doubt upon the will; but all the doubt was introduced by the parol evidence for the Defendant.

BULLER, J.

I think the Defendant was not only justified in taking the opinion of the Court, but that it was a proper case for it; therefore she ought to have her costs (51).

(51) This cause was on petition of Defendant reheard before the Lord Chancellor on the 28th July, 1791. In April, 1792, the Plaintiff

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Plaintiff died, before judgment. The suit was revived by her executor; and on the 8th March, 1793, the decree was affirmed by Lord Loughborough, C. Post, Vol. II, 78. *Farrington v. Knightly*, 1 P. Will. 544, 549, 550, note; Cor's edit. 700. 2 P. Will. 158, 338. 1 Vern. 473. 2 Vern. 99, 648. Pre. Ch. 12. 2 Atk. 18, 46, 68. 2 Ves. 27, 495. 1 Bro. C. C. 154, 201, 238. 2 Bro. C. C. 31. Post, *Clennell v. Lewthwaite*, *Thornton v. Tracy*, Vol. II, 465, 644. *White v. Evans*, *Holford v. Wood*, *Mordaunt v. Hussey*, *De Mazar v. Pybus*, *Dicks v. Lambert*, IV, 21, 76, 117, 644, 725. *Nisbett v. Murray*, V, 149. VI, 64, 324. *Abbott v. Abbott*, VI, 343. *Urquhart v. King*, VII, 225. *Sadler v. Turner*, VIII, 617. *Seley v. Wood*, *Williams v. Jones*, X, 71, 77. *Griffiths v. Hamilton*, XII, 298. *Rawlings v. Jennings*, XIII, 39. *Pratt v. Sladden*, Lord Cranley v. Hale, *Walton v. Walton*, XIV, 193, 307, 318. *Dawson v. Clark*, XV, 409. XVIII, 247. *Langham v. Sanford*, XVII, 435. XIX, 641. 2 Mer. 6. *Mence v. Mence*, XVIII, 348. 1 Ves. & Bea. 277. *Gibbs v. Rumsey*, *Southouse v. Bate*, 2 Ves. & Bea. 294, 396. *White v. Williams*, 3 Ves. & Bea. 72. *Coop. 58. Bull v. Kingston*, 1 Mer. 314. *Giraud v. Hanbury*, 3 Mer. 150. *Gadding v. Yapp*, 5 Madd. 56. *Skrymsher v. Northcote*, 1 Swanst. 566. *Parsons v. Saffery*, 9 Pri. 578. *Lynn v. Beaver*, *Ommancey v. Butcher*, 1 Turn. 69, 260.

SMITH v. MAITLAND.

1791.
 July 5th.
 Testator's mistake not rectified; because nothing to shew, what would have been the intention, if no mistake.

UPON the marriage of Mr. and Mrs. *Denew* in 1783, 1200*l.* 3 per cent. cons. were vested in trustees upon trust for the wife till 21; then for the husband during the marriage; then, if the marriage should dissolve without issue by her death, for the husband for life, and after his decease to go according to the appointment of the wife: but if it should dissolve without issue by his death, to be transferred to the wife, her executors, administrators and assigns. In 1784 by articles of separation between them it was agreed, that the trustees should be possessed of the same fund during the joint lives of the husband and wife for her separate use: but in case he should survive her, then it was go in the same manner, as was directed by the settlement, in case he should die in her life without issue. They lived separate afterwards. The wife died

died in the life of the husband without issue leaving a testamentary paper dated in 1786, and signed by two witnesses, to the following effect (52). After appointing the two Defendants her executors she proceeded thus: "And upon in gathering my effects and winding up my affairs my free gear are to undergo the following division; first my executors to pay my debts out of the first and readiest part of my gear; the residue to appertain *to themselves after paying the following sums; to Mrs. Squibb 100*l.* 3 *per cent.* *cons.* to Samuel Primrose 100*l.* 3 *per cent.* *cons.* In consideration of the trouble of my executors those sums to revert to them at the death of the legatees; and if any other of my legatees, Mrs. Arnold excepted, die before Mr. Denew, their legacies to revert to my executors or their heirs; the said Samuel Primrose and Mrs. Squibb being only meant to be life renters. To Mrs. Arnold 200*l.* of the said stock: to Mr. Smith 200*l.* of the said stock:" and after several other dispositions, "it is to be understood by my legatees, that the money bequeathed as before mentioned is in the 3 *per cent.* *cons.* the interest of which Mr. Denew is to enjoy agreeable to articles of separation between him and me till his death; and my legatees are to draw no more, than what the 100*l.* in the said stock will bring at the time of the sale; which is to be at the first or at the option of my executors the second term (53) after the death of Mr. Denew. The legatees are to pay *pro rata*, in proportion to what they receive, any expence that may be incurred." A bill was filed by the executors against the trustees to have an immediate transfer of the whole fund to them as appointees of Mrs. Denew; which was decreed. The bill in this cause was filed by the legatees Smith and Arnold against the executors; and the question was, whether the legatees were entitled to their legacies immediately, or were to wait the death of Mr. Denew; and, if they were to wait, whether they would be entitled to the dividends and interest accruing in the mean time.

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v.
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Mr. Mitford and Mr. Richards, for Plaintiffs.

All the expressions of the will tend to shew an intention, that as soon as that fund can be made a productive fund for the

(52) It was in the Scotch form.

(53) Quarter-day.

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the purpose, these legacies shall be paid. She thought, it could not be made so before the death of her husband: but he had given up his interest by the articles of separation; and the decree determined, that he had no life interest. There could be no other fund than this, because she was a married woman. She did not intend to postpone payment of the legacies for the benefit of her executors; for in the outset of the will the residue is given to the executors only after paying the following legacies. The direction as to the time of sale means, I suppose, that it shall *be as soon as possible. The direction, that the legatees are to have, what the 100% will bring in at the time of the sale, is, that they are to have 100% stock only, not 100% in money. That clause makes them specific legacies. At all events the Plaintiffs are entitled to have their legacies secured for their benefit, if not to immediate payment. Mrs. *Arnold* is entitled, though she should not live so long as Mr. *Denew*, at all events.

Solicitor General, for Defendants.

The whole effect as to Mrs. *Arnold* is only to make it a vested legacy, though she should die in the life of Mr. *Denew*: but the others will have their legacies only in the event of their surviving him.

Lord CHANCELLOR.

That must be the meaning of it. It is no more, than that under a mistaken idea, that her husband would be entitled during life, she has not given it till after his death; and the question is, whether I can reform that mistake. *Quâ ratione* can I reform it? Has the Court ever gone that length? It comes to the simple case, I have mentioned. It is plain, she mistook her power. It is probable, indeed there is no doubt, that if she had not, she would have given instant estates to many, or moulded them into estates for life, as she has some. But to comply with this demand would be going farther, than ever I knew done upon a will, by altering it because the testatrix was mistaken as to the condition of her property. There are no words to shew, what her will was; and I should be obliged to guess, what it would have been, if she had not mistaken her power, which would be going farther,

farther, than the Court has ever done (54). Mrs. *Arnold* is entitled at all rates, whether she lives as long as *Denew*, or not; but she is the only one so entitled; and she is not to receive it till his death: the others are entitled only, in case they shall survive *Denew*.

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(54) In *Doran v. Ross*, ante, 57, those words stood in contradiction. *Payne v. Collier*, ante, 170, the *Lord Chancellor* refused to comply with the intention against was a case of the latter kind; in the words of a deed; as there which the *Lord Chancellor* said, was nothing *dehors* those words the parties might come into to do it by; and the recital Court to have the settlement was general; but said, it would reformed according to their intention declared in the recital. be otherwise, if there was any thing in the recital, to which

PRICE v. WILLIAMS.

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1791.
July 7th.

IN an account several errors were assigned, and allowed by the Master to a great amount: but upon a reference to arbitration it was determined by the arbitrators to be perfectly free from error and overcharge in every particular. The *Solicitor General* had upon a former day moved to set aside the award; and on this day the *Attorney General* moved to confirm it. In support of the latter motion the arbitrators made affidavit, that upon the fullest inquiry and examination of all the evidence there was no error, overcharge, &c. but that it was a perfect account.

Parties to an
award bound
by it.

Mr. *Graham*, against the award,

Applied for time to consider, whether affidavits should be produced, which could be made by respectable persons, who were ready to swear, that the arbitrators did not look into the evidence of more than five *items* out of a great number.

Lord CHANCELLOR.

I cannot help saying, I am rather surprised at the result of the reference; and that in an affair of such a nature as an account, and where after much examination so many errors were assigned and proved, it should now come out to be a

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PRICE
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WILLIAMS.

perfect account entirely free from error. But by saying that I would not be supposed to mean to impute anything wrong to these arbitrators; who are very respectable. If that fact can be brought home to them, they are flatly perjured, and may be indicted. But the question now is not so much, what they did, as what the parties can do. I think, they have by choosing private judges placed it beyond the reach of any principle of law. I do not know, what a by-stander might call looking into the evidence upon the *items*. Let it stand to the last day of Term to consider, whether those affidavits shall be made.

It was not mentioned again (55).

(55) *Knox v. Symmonds*, post, 369, and the references.

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1791.

July 12th.

Legacy out of a fund in the *East Indies*, given over in case of death of legatee before he might have received it, vested from death of testator.

HUTCHEON v. MANNINGTON (56).

HUTCHEON, jun. in 1781 by will reciting, that all his fortune was entirely of his own acquiring, consisting of about 8627*l.* and was all vested in securities in the *East Indies*, gave several legacies, some absolutely, but most of them were distinct legacies to several of his brothers and sisters for the proper use and benefit of each legatee, with a clause to each; directing, that if the legatee should die, before he or she "may have received the legacy," it should go to the children of the legatee equally, share and share alike, and in default of issue among the other brothers and sisters. Then reciting how much these legacies would amount to he gave the residue, after having calculated the amount of it, to his father for his own proper use and benefit; "but in case of his death before he may have received the rest and residue of my estate before mentioned," he gave it over to his brothers and sisters before mentioned and their children. He made the Defendant executor; and died very soon after making the will. His father died in 1784 without having received any part of the residue. The bill was brought by the brothers and sisters of

(56) 4 *Bro. C. C.* 491, *n.*

of the testator, to whom the residue was given over, claiming it upon the event of the father's death, before he received it.

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HUTCHESON
v.
MANNING-
TON.

Solicitor General, for Plaintiffs.

The meaning of the testator must be this, and was suggested to him by his situation, that of his relations here, and the property. He seems to have recollected, that the property must be sent over; and did not mean to vest any interest in his relations here, merely because they might happen to survive him; but if they did not live to receive it, he intended to substitute other persons to take it. It is impossible, he could mean the same thing, as if he had said, "I give it in case of their surviving me." Suppose it was a real estate devised upon trust to sell with all possible diligence, or in a reasonable time; the Court would inquire into that, and make the executors pay costs, if they did not follow the directions. So in this case *there ought to be an inquiry, within what time he might have received it. The Plaintiffs say, the estate could not be got in *India* before the father's death.

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Lord CHANCELLOR.

I cannot find any topic of argument to reason this upon. Suppose any of these legatees had died within a year after the testator, there might then have been some ground for saying, that the testator alluded to the known practice of the Court to compute interest upon legacies from a year after the death of the testator. I rather believe, he had some such purpose, as you attribute to him, in his contemplation. There is a faint indication of a purpose, that there shall be some time or other, when these interests shall go over, and that they shall not vest in the mean time. But has he conceived that intention, and expressed it with such definite certainty, that I can act upon it? I am to compute, what time would be sufficient to enable these parties to receive their legacies. It is all too uncertain. Suppose they lived, and claimed their legacies: they must have been computed with interest from a year after the death of the testator,

Interest of legacies to be computed from a year after

testator's death; unless some other time appointed by testator: but he cannot make executor answer interest beyond what the law has done.

Estate devised on trust to be sold with all possible diligence or in reasonable time considered as sold from testator's death.

1791.

HUTCHEON
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TON.

testator, if no other time was appointed. If he had given any time, I agree, that the intention is to prevail, if it can be found out; (though a testator cannot make an executor answerable for interest, beyond what the law has done) but he must give me some rule to go by. Suppose he had given a real estate in the manner you specify; it is clear, that it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness: in some way it may be sold immediately: but I should not inquire, when a real estate might have been sold with all possible diligence; for it might be the very next day or that very evening; and therefore the Court always in such a case considers it as sold the moment the testator is dead; for where there is a trust, that is always considered here as done, which is ordered to be done (57); and the Court cannot measure the time. Suppose this property had been in the *West Indies* instead of the *East*, it would have required less time to be remitted; still less if in *Jersey* or *Cumberland*; and if only 100 miles off, it would have cost a journey of two days at least. In this case it is an immeasurable purpose. I can do nothing with it; and it must be considered as vested from the death of the testator (58).

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The next day the *Solicitor General* obtained leave to mention this case again at the sittings after Term upon suggestion, that he did not think, justice was done by the decree.

On the 20th it came on again: and the *Solicitor General* desired, it might stand over farther, as an agreement between the parties relative to the fund in question had been since discovered, which might make it necessary to file a supplemental bill. All parties consenting it was ordered to stand over.

(57) See post, Vol. VIII, 556, VII, 89. *Elwin v. Elwin*, VIII, the judgment of the Master of the Rolls in *Elwin v. Elwin*. 547. *Fearns v. Young*, IX, 549. *Wood v. Penoyre*, XIII, 325.

(58) Post, *Gaskell v. Harman*, Vol. VI, 159; XI, 489. *Sitwell v. Bernard*, VI, 520; where the Lord Chancellor calls the construction in *Hutcheon v. Mannington* too bold. *Innes v. Mitchell*, VI, 461. *Gibson v. Bott*, VII, 89. *Elwin v. Elwin*, VIII, 547. *Fearns v. Young*, IX, 549. *Wood v. Penoyre*, XIII, 325. *Walker v. Shore*, XIX, 387. *Bernard v. Mountague*, 1 Mer. 422; Vol. XI, 508, in the note. *Taylor v. Hibbert*, 1 Jac. & Walk. 308. *Fitzgerald v. Jervoice*, 5 Madd. 25. *Angerstein v. Martin*, *Hewitt v. Morris*, 1 Turn. 232, 241.

Upon the 27th of *January*, 1792, it came on; and the Plaintiffs submitting to the opinion of the Court in the decree rested entirely upon the agreement, which had taken place upon disputes among the family, whether, if any legatee should die before the legacy was received, it should go over.

Upon that agreement the *Lord Chancellor* said, the relief prayed was all of course.

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TON.

DOWSON v. HARDCASTLE.

HARDCASTLE had deposited some tallow in the wharf of *Dowson* for *Meggot*; who a few days afterwards became bankrupt. *Hardcastle* then applied to *Dowson* to have the tallow re-delivered; and upon refusal brought trover. *Dowson* filed a bill of interpleader and for an injunction. The *Lord Chancellor*, being of opinion, that the action brought would decide the point between *Hardcastle* and the assignees of the bankrupt, refused the injunction. The verdict was for the Defendant. The only question in this case was, whether upon an interpleading bill costs could be given as between the Defendants.

1791.
July 12th.
2 Cox, 278.
Costs of Plaintiff in interpleading bill, and of Defendant, who succeeded at law, ordered to be paid by the Defendant, who failed.

Attorney General and Mr. *Lloyd*, for Defendant *Hardcastle*.

This Defendant was the original owner of the tallow; and was actually cheated by the bankrupt: but the verdict being against him, he was obliged to pay all the costs at law. If this * had been money in Court, the Court would have given him costs. Here the money is not in Court; because *your Lordship* would not grant the injunction; as you thought, the action, which had been brought, would try the point. Lord *Kenyon*, when *Master of the Rolls*, upon an interpleading bill directed an issue to try, who was in the right; and made the Defendant, who was in the wrong, pay all the costs of the suit.

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Lord Chancellor.

Upon an interpleading bill the Plaintiff is to have costs; but
I never

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 ~~~~~  
 DOWSON  
 v.  
 HARDCASTLE. I never knew an instance of giving costs as among the Defendants. The Plaintiffs in this case are mere stake-holders; and were driven by an action at law to file the bill. They have an undoubted right to their costs. I shall consider this as money brought into Court: but I do not know, that even in that case it can be done, But it seems to be the natural justice of the case in this instance; and I am inclined to do it, if I can; therefore look into it, and if you can find an instance, mention it to-morrow.

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The decree, as drawn up, directs the Defendant *Hardcastle* to pay to the Plaintiff, and to the other Defendants, the assignees of the bankrupt, their costs; and thereupon the Plaintiff to deliver the tallow, subject to the wharfage and other charges to the Defendants, the assignees (59).

(59) Post, *Aldridge v. Mesner*, *Hubbard*. The case of *Dun- Vol. VI, 478. Cowtan v. Wil-* *gey v. Angove*, II, 304, where a *liams*, IX, 107. *Martinius v.* bill of interpleader was dismiss- *Helmuth*, 2 *Ves. & Bea.* 412, in ed with costs, as between Attor- the note to *Stevenson v. Ander-* *ney and Client*, to be paid by the *son. Hodges v. Smith*, 1 *Cox*, 357. Plaintiff and his Solicitor, turn- See another case collected by ed upon the special circumstances of fraud. The Plaintiff in an in- Mr. *Beames*, *Costs in Eq.* 37. The terpleading suit paid his costs costs, generally, are given as out of the fund: *Campbell v.* between party and party; post, Vol. XIX, 205: *Dunlop v. Solomans*, 1 *Sim. & Stu.* 462.



1791.  
*July 19th, 20th.*  
 Arbitrator on  
 general refer-  
 ence of all  
 matters, &c.  
 may go farther,

### KNOX v. SYMMONDS.

CROSS motions were very fully argued upon the merits of an award made in this cause upon a general reference to arbitration. One supported by the *Attorney General*, Mr, than the Court could, to do complete justice: and may therefore relieve against a harsh right, which in a Court of justice would prevail: a party may impeach the award for corruption or gross mistake, not for erroneous judgment; in case of mistake the arbitrator must be convinced of it, and that he acted upon it. But arbitrator on reference to inquire into facts, &c. is as a Master; and the Court will draw the conclusion; or if he has, will see that it is right. Award on general reference not to be impeached by exceptions, but by cross motions to set aside and confirm it.

Mr. *Mansfield*, and Mr. *Hollist*, for the Defendant was for an attachment against the Plaintiff for not performing the award. The other supported by the *Solicitor General*, Mr. *Douglas*, and Mr. *Richards*, for the Plaintiff was to have the award set aside.

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KNOX  
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On the 13th *July*, when the attachment against the Plaintiff was moved, the *Solicitor General* desired, that it should stand over for a few days; and excused the length of time elapsed since the award by saying, the Plaintiff had filed exceptions to \*it; but the *Lord Chancellor* thought, that was not the proper mode according to his determination a few days before in *Price v. Williams*, 3 Bro. C.C. 163, but that cross motions should be made.

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*Lord Chancellor.*

A party to an award cannot come to have it set aside upon the simple ground of erroneous judgment in the arbitrator; for to his judgment they refer their disputes; and that would be a ground for setting aside every award. In order to induce the Court to interfere there must be something more; as corruption in the arbitrator, or gross mistake, either apparent upon the face of the award, or to be made out by evidence: but in case of mistake it must be made out to the satisfaction of the arbitrator; and the party must convince him, that his judgment was influenced by that mistake; and that, if it had not happened, he should have made a different award. But this relates only to a general reference to arbitration of all matters in dispute between the parties. Upon a reference to an arbitrator to inquire into facts, &c. the reference is to him in the character of a Master; and the Court is to draw the conclusion; and if the arbitrator has taken upon himself to do so, the Court will see, that he has drawn a right conclusion (60). Upon a general reference to arbitration of all matters

(60) In *Milligan v. Dick*, Court be taken to the award; *March*, 1792, sittings after Hilary Term, the *Lord Chancellor* said, and if the exceptions are allowed, the Court will refer it to a Master; but will not refer it back that upon a reference of this kind to the arbitrator without consent exceptions may with leave of the

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matters in dispute between the parties the arbitrator has a greater latitude than the Court, in order to do complete justice between the parties; for instance, he may relieve against a right, which bears hard upon one party; but which, having been acquired legally and without fraud, could not be resisted in a Court of Justice; as in the case of *Perkins v. Okens* before me last Term. That was the common case of a bill for specific performance of an agreement to take a public house, which turned out to be a very improvident bargain for the Defendant; who had entered into it incautiously: yet, as he could not effect it with fraud, the Court held, that the common relief of a specific performance could not be refused. But, as from the evidence, though it did not come up to fraud, the case appeared not to be favourable for the Plaintiff, the Court recommended a compromise; which accordingly \* took place; and the Defendant was let off upon paying a sum of money. If that case had been before an arbitrator, he might have let off the Defendant upon paying a sum, less than the Plaintiff insisted on; and the award could never have been set aside upon that account.

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sent. See farther upon Awards, 282. *Fetherstone v. Cooper*, ante, 226. *Price v. Williams*, *Young v. Walter*, IX, 67, 364, 365. Post, *Morgan v. Mather*, *Anderson v. Darcy*, XVIII, 447, *Dick v. Milligan*, *Lord Lonsdale* *Goodman v. Sayers*, 2 Jac. & *v. Littledale*, Vol. II, 15, 23, *Walk.* 249. *Wood v. Griffith*, 451, and the notes. *Emery v.* 1 *Swanst.* 43. *Beddington v. Wase*, V, 846. *Walker v. Fro-* *Southall*, 4 *Pri.* 232, *bisher*, *Ching v. Ching*, VI, 70,

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### NABOB OF THE CARNATIC v, EAST INDIA COMPANY.

July 11th, 23d.

3 Bro.C.C.292.

Bill by Nabob  
of the Carnatic  
v. East India  
Company for  
discovery and

THE bill stated, that the Plaintiff being indebted, or alleged by the Defendants to be indebted, to them, an agreement took place in 1781 between the Plaintiff and Lord *Macartney* the

account of rents and profits of his territories while in their possession as security for debt, and for the balance, submitting to pay it if against him. Plea, that by divers charters, &c. and statutes confirming them Defendants have

the Governor and the Council of *Fort St. George* acting for the Defendants, by which the Plaintiff assigned as a security for the demand of the Defendants certain districts of the *Carnatic*, the revenues of which the Governor and Council were to receive and account for: under this agreement they were in possession, and received the revenues till 1785, when by another agreement the Plaintiff was restored to the possession of his territories and the receipt of the revenue; and he agreed to pay his proportion of the current charges to be finally settled by a future treaty, which took place in 1787, and that till such proportion could be ascertained, it should be considered at four lacks of pagodas a year: he also agreed to pay twelve lacks of pagodas annually upon account of the debt due to the Company and to private creditors, till it should be discharged, and another sum for other occasions. The bill having stated these facts charged, that the Defendants had received more, than their demand could amount to, and that upon a fair account a considerable balance would appear in favor of the Plaintiff, and praying a discovery and account; and that if a balance appeared in his favor, it might be paid to him, submitting to pay the balance to the Defendants, if any should be found due to them.

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The Defendants pleaded, that by divers charters, letters patent, deeds, and acts of Parliament confirming the same, these Defendants have given, granted, and confirmed to them with \*other privileges the sole privilege of trading to the *East Indies* between, &c. (describing the limits): and by the same charters, &c. they have given, &c. to them free liberty to send

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have sole privilege of trading to *India*, and a right to send men, ships, &c. and to commission officers to continue or make peace and war, &c. for their advantage, with any natives not Christians: that Plaintiff is a native sovereign not a Christian: that all the transactions in the bill passed between him as such sovereign and Defendants in exercise of their privileges; and related to matters transacted between them with regard to peace and war, and security and defence of their respective possessions; and therefore are not cognizable in this or any municipal Court. Plea over-ruled: and, having been once amended, farther time refused: and Defendants compelled to answer immediately.

Plea to jurisdiction must shew another. Plea to jurisdiction of all Courts absurd, because the same as plea in bar.


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send ships of war, men, and ammunition to any of their factories for their security and defence, and to choose officers; and give them power under their common seal to continue or make peace or war with any of the natives not being Christians, as should be most for their advantage; and to recompense themselves upon the goods of the natives, by whom any damage or interruption of their trade should be sustained: that the Defendants have by the exercise of the liberties before mentioned acquired large territorial possessions within the limits of their trade, particularly in the *Carnatic* and *Coromandel*, in defence of which and of their trade they have before and ever since the time of their transactions with the Plaintiff maintained, and still continue to maintain, a large military force; that the Plaintiff is a sovereign prince within the places of their trade, not a Christian, and holds and enjoys several large territorial possessions within such places, particularly in the *Carnatic*: that the agreements stated, and the transactions mentioned in the bill were transacted by these Defendants, acting under and in exercise of the liberties and privileges so given to them, and the Plaintiff, as such prince as aforesaid; and that all the dealings and transactions mentioned in the bill relate to matters • transacted between them with regard to peace and war, and the security and defence of the territorial possessions belonging to them respectively. The plea then averred these facts to be true; and insisted, that these dealings and transactions being so made and entered into are not cognizable in this Court or any municipal Court of Justice.

Attorney General, Solicitor General, Mr. Mansfield, Mr. Rous, and Mr. Stratford, for the plea.

The question intended to be submitted to the Court is, whether both parties being sovereign independent powers their contests can be made the subject of dispute here. Their treaties cannot be a subject for the municipal jurisdiction of any Court in the country of either of the contracting parties. These agreements relate to peace and war; and the power of making peace and war is particularly delegated to them. The power, which the Company exercise upon these occasions, is in fact that of the state; for the King can by act of Parliament communicate to them his power of making war

war and peace; and has done so under certain restrictions; namely, to extend only to the native princes of the country, and to have the concurrence of the supreme power. The sovereignty is expressly reserved to the Crown; then the prerogative of making war and peace could not belong to them, if not delegated to them, which it has been always from the time of *Charles II.* down to the last act. The character, in which they may make reprisals, is just like the commissions to commanders of sea and land forces; it is not the act of the individual, but of the country. If their power is to be referred to the state itself, and when war is made in *India* in pursuance of their charter, it is not the war of the Company, but of the state, there is no doubt, that they are a sovereign power, as the other contracting party is clearly. By the treaties of 1768 and 1769 between this country and those then at war with it the Plaintiff is treated as a sovereign power. The next consideration is, whether the subject-matter of those two treaties in 1781 and 1785 can be referred to the prerogative of making war and peace. It was necessary and proper for the parties to enter into a treaty for their mutual defence. The payments to be made by the Nabob from time to time fell into arrear. But these were not the only treaties between them. This Court cannot regulate the nature of the connexion between them, as if it was an agreement between man and man. If any of the stipulations were broken, how could this Court enforce the execution? The Plaintiff agreed, that if the persons appointed to collect the revenue should be deficient in their duty, he would dismiss them and appoint others: suppose the fact of their deficiency and his refusal to change them proved; how could your Lordship appoint a receiver? If the Court cannot do justice as to one party, that is a strong ground for saying, it cannot be a suit here. By the last act 24 *Geo. III.* c. 25, no act of government can be done by the Company unless approved by Commissioners of this country. By sections 13 and 15 of that act the Board of Control are authorised to send out secret orders, to which the government in *India* are bound by the act to pay faithful obedience. Upon that act it is possible, that a case may arise, of which the Court ought to take notice, but which could not be stated upon the record. Suppose the Board who are to direct all their operations, had sent out secret orders not

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to account to the Plaintiff: they are bound by those positive orders in the act of Parliament against the prayer of the bill: and to disclose that would be disclosing the orders, which the legislature has said shall be secret. This Court then might then repeal the act merely by holding jurisdiction; for the Defendants cannot state the cause of their non-compliance, as that would reveal the orders, the secrecy of which the legislature has enacted; or the Court might be decreeing contrary to those orders upon facts partially disclosed. That is another strong reason. Questions of sovereignty must continually arise between these parties. The acts of Parliament giving them these powers are from the time of *Charles II.* to the last charter. In 1677 they were authorised to raise forces, exercise martial law, to choose officers, who were to follow the directions of the Company, to make peace and war, and to coin money. The same powers were given, when they acquired *Bombay*, in nearly the same terms and exactly to the same effect. That was in 1727; when they were empowered to appoint officers, to raise forces, and such officers were empowered to make reprisals, &c. By letters patent in 1750 they were empowered to raise and maintain troops, and to make war with any princes not being Christians. By a subsequent charter 1758, 31st *Geo. II.* it was found expedient to give them a farther participation of the prerogative by giving to them a proportion of the booty taken in war in some circumstances, and the whole in others. By the 13th of the present King, c. 63. s. 9, all civil and military government in *India* is put under a Governor General and Council; and war and peace must have the approbation of the supreme government. The acts of Parliament confirm the charters, and make them part of those acts. The question upon the plea is, whether, supposing the matter of it true, the Court can give the Plaintiff relief, or a discovery to enable him to ask for relief. If the whole of the instruments represented as agreements had been stated in the bill, the Defendants would have demurred. Where the Plaintiff states his demand in 1785, it is spoken of as a demand to be finally settled by treaty between them; and I believe they forebore to state the existing contracts upon the bill, because if they were stated, they would appear to be treaties. I do not object to his suing here,

here, because he is out of the jurisdiction of the Court, as he has made that offer, with which the Court can make him comply, and give security to the Defendants: but still his case is very different from that of a common stranger happening to be out of the jurisdiction of the Court: for that security would not discharge the personal obligation * to make good the exigency of the decree; and if a common Plaintiff in those circumstances should come here without executing it, your Lordship would send him to the *Fleet*, or otherwise exercise your power to make them execute all, he had submitted to do. But if this person was to come here, the Court would not do that; and that never can be within the jurisdiction of the Court, which it cannot execute. If the facts of the plea, (which are averred to be true) are a bar to the relief, as the discovery is sought for the sake of the relief, it will be good as to both. If this country owed the King of *Spain* as large a sum as the amount of the *Manilla* ransom, this Court would not upon a bill filed against any party in this kingdom compel that party to make any discovery. The Company stand in this situation under these instruments; that by lawful means they have delegated to them this portion of the sovereignty of this country; or rather those, in whom the sovereign power of this country resides, have authorized them to transact for that power as it could for itself with the native powers of *India*: and as, if his Majesty had entered into the same treaty with the Plaintiff, this Court could not have entertained jurisdiction in that case, neither can it in this for the same reason; namely, that the matters, transactions, dealings, and instruments stated in the bill are upon behalf of the sovereign power of this country entered into and transacted by those, who by the authority of the sovereign power of this country have a right to exercise that power on behalf of those, who gave it, and whose acts therefore are not to be considered as the acts of individuals. That is the substance of the plea. If this country had never given the power it has, it would have reserved to itself the power of treating with these Princes; and then no municipal Court would have taken cognizance of it: neither will they, when the only essential difference is, that the nation has delegated this power instead of itself exercising it. It is impossible to enforce the treaty of

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of 1781 here as the treaty with *France*. How could the Court deal with the Plaintiff? He was to allow the Governor and Council to name renters: could your Lordship refer it to see, who should be renters of the Plaintiff's country? Then his orders are not to affect the revenue: suppose the Defendants say he did, how could the Court relieve?

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*Lord CHANCELLOR.*

This agreement is as good supposing neither party a sovereign power, but that it was a case between private persons.

For the plea.

I state these particulars, allowing that these objections might be made between these individuals in the same case: but I mean also to say, this impracticability arises from the character of the persons and the nature of the subject: the one party representing this nation, the other the nation of which he is prince; and that the subjects of dispute between them are those of nation treating with nation. Looking to the nature of the property and the impracticability arising from the character of the parties, it would be as easy to satisfy your Lordship, that if the Court of *France* had agreed to give up any province of *France* to the government of this country upon their agreeing to account for the rents and produce of any county in *England*, this Court could hold jurisdiction upon the subject. The right of exercising sovereign power has been given to the Defendants from the earliest of their charters, recognized in almost every act of Parliament, and restrained by some latter acts, by appointing Commissioners to approve their exercise of those powers. Those do not affect the truth of the plea; for the effect of them is only to enable Commissioners to point out in what respect, they shall exercise the liberty given by former acts; or else the Company may be considered as exactly in the same situation as ministers. By the 21st *Geo. III.*, they are directed to obey the directions of the Secretary of State, as far as relates to negotiation with the country powers of *India*, and to making peace and war. Upon the face of that act it appears, that the Plaintiff is one of those powers. But the 24th *Geo. III.* c. 25, goes farther; for by that even the government of these  
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very territories, and all matters relative to the civil and military transactions, are vested in the Crown, and directed to be exercised by Commissioners named by the Crown; therefore now by that act the Company stand only as a name, in which the Crown exercises those powers; and the whole subject-matter of the plea is in the executive government, who exercise it in their name. The Court must take notice, that the directions, which the Governor and Council may receive under that act, may be of such a nature, as if stated upon the record might prevent this Court from interfering \* at all, because this Court is bound by the general law, and yet it cannot be shewn to the Court. The Company under the last acts retain the powers delegated to them before, subject only to such restrictions, as the new body interposed should make the exercise of their former privileges subject to.

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*Lord* CHANCELLOR.

Your argument applies to this case: suppose the Nabob as a sovereign, to whom the Company were indebted; and a war had arisen between them, which put an end to the previous obligation; and that they had pleaded that, and that it was lawfully commenced, and therefore he had no competent demand against them; or suppose that demand had been discharged by a treaty of peace; with regard to that your argument would apply. But how does the plea bring that forward? The difficulty with me is to get to that point. Whether this Court would interpose upon a right of war and peace upon the *jus gentium*, is a question, which may deserve great consideration (61). I think, the Company being merchants and sovereigns at the same time may cover every thing they do by pleas of this large nature; for except that they plead, that the Plaintiff is a sovereign, I do not see, that they plead closer, than if it was a case of a simple loan: nor do I understand the words "relative to peace and war." They have not qualified their possessions to be royal, nor accompanied with any dominion of any kind. I must hold their possession under him to be the possession of his tenant. They must shew me by the acts of Parliament, that their territorial

(61) Post, *Barclay v. Russell*, Vol. III, 424. *Dolder v. Lord Huntingfield*, XI, 283.

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territorial possessions are qualified as a realm. They do not under the acts qualify them as a realm *seorsim*. But I do not tell you, that a case upon the *jus gentium* might not be stated, that perhaps it would be impossible for this Court to come at; I only want to bring it to the point.

For the plea.

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If it was a case of a simple loan of money between these parties, it could not be made the subject of civil jurisdiction, from the consequences it would draw with it. Any transactions between them must be decided by another rule. The final treaty in 1787 was attended with all the formalities of a treaty between two sovereign powers. The Defendants not being actual sovereigns cannot state themselves so: but they state, that so much of the power of this country is delegated to them, as * makes them so far a sovereign power. The power of war and peace includes every power, that can have place between nations. No law but the law of nations can take place between sovereign powers. The Nabob and the Company have agreed to employ a certain proportion of their revenues for their mutual support. Suppose, while this suit was depending, he was entering into negotiations with their enemies, and intended to employ their money, if paid to him, against them: your Lordship could not take notice of that: but between nation and nation it would be a very good answer to the demand, that it would strengthen the hand to be immediately raised against the nation making the payment. Suppose a balance appears in his favour to the amount of 100,000*l*. but that the Defendants know, that he has committed devastations to that amount: it would be an odd inquiry for a Master to enter into in order to set off that: but by the law of nations it would be very proper. This Court acts *in personam*. A suit between sovereigns is perfectly new. There is no instance of it in the books except one in *Roll*. where the King of *Spain* is said to have brought an action here against some people, who cut logwood in his dominions. But if sovereigns have ever been suitors in the Courts of this kingdom, it has only been as to private rights, which are connected with the internal government of the state, and therefore subject to the municipal law. It is impossible to say, this is the
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subject of municipal law, without allowing that any sovereign may maintain an action upon the case against an ambassador for deceit and practice in negotiating a public treaty. The rules of decision in the law of nations are very different from those of the municipal law of this country. Good faith is the foundation of the latter, as it ought to be of the former: but in the law of nations *salus regni* is the first rule. All force, circumvention, and stratagem avoid compacts between individuals, not between states; because in the former case there is a superior authority, which can do justice between the parties; in the latter the *ultima ratio regum* is the only way of settling it, if it cannot be done by negotiation.

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Lord CHANCELLOR.

You do not mean, that the *Dutch East India Company*, if they were to apply here, would be stopped in this way.

For the plea.

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Yes, if they were acting as allies of the country powers; for then it would be subject to the law of nations. It appears in the charter of *Geo. II. 1758*, that the Company may have enemies distinct from the enemies of this country. In the war with *Tippoo Saib* the Company cannot be considered as the agent of this country; for the essential character of an agent is, that he is to be called to account; that is not the case here; nor is that war considered as the war of this country. The *Dutch* memorial, presented to the Crown in 1763, complained of the conduct of the *East India Company* to the Crown, not as having any compulsory power over them, but represented it to the Crown as a mediator, and certainly one very powerful; as the Company stood not only in the situation of a sovereign power in the *East Indies*, but also in that of subjects in this country. It does not appear, that government interfered farther than by sending it to the Company with directions for them to answer it. They were treated as a sovereign power by that memorial, and by the answer to it, which was drawn up by a very great lawyer. It does not appear, that any thing farther was done. The Company are subject to the government of this country in a different character from that, which they support in *India*. If the Court

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cannot do equal justice, it will not hold jurisdiction. But it could not enforce a decree even against the Company with any effect. Suppose an account decreed: and upon farther directions it appears, they have been paid the whole; and therefore he has a right to a reconveyance: how can that be effected? As they are a body, how can they be committed? Or if they can be committed, what effect will that have for the Plaintiff? Or suppose they did reconvey; they might immediately declare war against him, and take it back again.

*Mr. Mitford, Mr. Anstruther, Mr. Adam, and Mr. Fonblanque, for Plaintiff.*

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As there is no demurrer, the bill must be taken to be true; and I can only argue, as to what I find upon the plea, connected with what is contained in the bill. A plea is a special defence demanding judgment upon particular circumstances in this way; whether upon such circumstances stated in the plea, and not in the bill, combined with the circumstances in the bill, the Court can see clearly, that it ought not to permit the suit \* to proceed any farther, and to investigate the case under all its circumstances. Therefore it must consist of facts, from which the Court draws the legal conclusion, either that it has not jurisdiction, or that it is not proper for the Court to entertain jurisdiction upon the subject. The whole must appear upon the face of the pleadings, in order that the parties may appeal or file a bill of review. Nothing therefore can be read upon a plea. Acts of Parliament are read only to assist your Lordship's memory: but in contemplation of law they are in the mind of the Court. This plea is wholly defective (62). It admits the case made by the bill, which is a mere bill for an account with an offer to discharge the balance, if found against the Plaintiff; but it says, there are reasons, why this Court will not make a decree.

(62) Upon a former day on them to agree upon the state of motion to enlarge the time for facts, so as to bring the point putting in the amended plea in fairly before the Court, in order this cause, each party complaining to get the opinion of the Court of the informality of the as soon as possible, that they pleadings on the other side, the might appeal.

*Lord Chancellor recommended to*

cree. They have not stated, that those acts of Parliament contain those instruments referred to; and therefore leave the Court perfectly short, when they are thence to judge of the contents of the deeds, though they may be supposed to know, what are the acts of Parliament. The plea only asserts, that they have those rights. It is impossible for the Court to judge of the nature of the powers given to the Company by the Crown or the legislature by the charters, deeds, and acts of Parliament referred to. The Court ought to judge from the charters themselves as set forth in the plea, and not to take the construction of the parties from the plea. They have only stated inferences from supposed facts, which are not stated for your Lordship to judge of and draw the inference yourself. This is not a plea to the jurisdiction of the Court, under which it can be brought to another jurisdiction; for which reason it will not be supported, if it is possible to avoid it. As the charters, &c. are not set forth, if judgment is given for the plea, nothing will appear upon it in the Court above. Neither have they set forth the particular clauses, upon which they rest; so it is impossible for the Plaintiff to shew, that those clauses are not now in existence. Suppose a man pleads simply, that he is a purchaser for valuable consideration; that is not a good plea. In *Chamberlayne v. Knapp*, 1 *Atk.* 52, Lord *Hardwicke* took notice of that as a bad plea. There the plea did not set out the date of the \* deed, nor the particular parcels of land contained in it: and the Court said, the plea was bad; and that a purchaser would be bound to set forth his deed for the Court to see, &c. A person pleading as a purchaser must set out, how he, from whom he purchased, became entitled; *Hughes v. Garth, Amb.* 421 (63). Some of the Counsel for the Defendants have considered them as a sovereign power; some as dependent; some as independent; some as merely agents: but from the plea I collect, that the real suggestion made is, that the subject is not matter of municipal jurisdiction, because relating to transactions between the Plaintiff and Defendants respecting matters of peace and war, and the security of the territorial possessions of both. The bill involves no such matter: and the

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(63) The person, under whom the purchaser claimed, was not in possession at the time of the conveyance. See *Mit.* 215.




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the plea going to deprive the Plaintiff of the benefit of his suit ought to state clearly, what would induce the Court to think the suit improper for its decision. It would be very different, if the Court was now hearing the cause: then it could judge, how far it could interfere. The Company being created for the purposes of trade, and having powers given to them beneficial to themselves and this country, are in that character amenable to the jurisdiction of this Court; and all persons having transactions with them must consider them as a body politic so formed, obedient to the sovereign power of this country. A sovereign power according to the argument for the Defendants cannot exist. It must be that, which directs the operations of a state, which must be a people existing somewhere; an association of people assembled together, and having a will to guide them. Here is nothing but an artificial creature of the law of this country, authorized to perform these acts of sovereignty, which it could not lawfully do without licence; viz. to have military forces, acquire territorial possessions out of this kingdom, &c. Nothing more was granted to them than an indemnity from the punishment, which private persons would incur by those acts. It is doubtful, whether this country could make a sovereign power; for that must depend upon the acknowledgment of other powers. But this is nothing like a state; but a species of corporation created for the purposes of trade, and having with a view to promote those purposes powers delegated to them, which do not in any degree create them a sovereign, much less an independent, state. If *the charters, &c. had been stated, their claim would have appeared ridiculous; for they will not exist in a few years, unless a fresh existence is given to them. They have had notice to quit already. By one of the charters they are amenable even to the *Mayor's Court at Madras*. Then the only question is as to the character of the Plaintiff, whether he has not a right to come here; and whether the Court ought not to take cognizance of his suit. He is an alien and a sovereign prince: but it is not pretended, that he is an alien enemy: therefore as an alien he has a right to come here. So he has as a prince: nor is the subject of the suit improper for the Court to take into its consideration upon the matters disclosed by the bill and plea. As a sovereign he cannot be compelled

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compelled to sue here : but that is no reason, why he may not. Justice and policy require, that, if he does, his suit shall be attended to. According to the rules, which have long prevailed between nations as to peace and war, it is the duty of one sovereign to state the injury done, and require redress, before he proceeds to redress himself. If the persons committing the injury are subjects, and not the power itself, there are two modes; either by application to the sovereign power, or to the ordinary justice of the country. In case of individuals of different countries all the writers on the law of nations hold, that war is not to be declared, nor letters of reprisal to be granted, till justice has been denied by application to the Courts of the country, and also in the extraordinary way, to the sovereign power. If the first succeeds, there is no occasion for the second. Why is not this equally proper in the case of a sovereign injured, when the nature of the injury is a private debt from the subjects of one country to the sovereign of another? Courts of justice here have acted with a view to such circumstances. The first case in the books is the *Spanish Ambassador v. Pountes*, 1 *Roll. Rep.* 133. The Ambassador libelled the Defendants in the Admiralty Court of this kingdom for having cut down 300 loads of *Brazil* wood in places under the dominion of the King of *Spain*, and having brought them to *England*: a prohibition was granted, because the Admiralty Court cannot hold plea of any thing done upon land: but it was held by *Coke*, that he might bring an action in the Court of *King's Bench*; which was done. In the same case, 1 *Roll's Ab. title Admiralty*, 532, it is said, that a prohibition was granted; and that it was afterwards tried at common law in trover. In the same case, 2 *Bulst.* 322, it is said by *Coke*, that the Admiralty * Court cannot hold plea for any thing done in the kingdom of *Spain*; but that it may be laid any where in *England*. In the *Spanish Ambassador v. Jolliffe*, *Hob.* 78, it was resolved, that the Admiralty Court can only hold jurisdiction upon contracts arising at sea; therefore if any stranger or other will ask justice at the hands of the *King of England*, he must ask in the Courts of common law, which have an unlimited power in cases transitory: and that suit was no other than a mere action of trover. *The Spanish Ambassador v. Gifford, Moore*, 850. There in an action upon the case the question

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question was simply, whether a writ of error was a *supersedeas* of a *scire facias* against bail, as to which it is more fully stated, 1 *Roll.* 371. It was said by *Coke*, that it would not stay the *scire facias*. The same case is in *Bulst.* 182, and 2 *Roll's Ab.* 491, but the ground of the action was never doubted. In *Moore*, 814, the question was only, whether an appeal lay. *Hob.* 113. That was a bill in Chancery by the Ambassador of *Spain* as procurator for all his master's subjects: it was demurred to, only because he could not qualify himself as procurator for all his master's subjects; but not upon the ground that he could not sue in his master's behalf for any thing belonging to him. In *Ogden v. Folliot*, 3 *Term Rep. B. R.* 726, upon a question, whether the treaty of peace with *America* had reference to the first declaration of independence, Lord *Kenyon* said, if that was true, the bond in question was lawfully transferred to the executive power; and if so, he did not see, why an action might not be brought. It is clear therefore, that the Courts will entertain jurisdiction of matters, which may be made properly cognizable in them, to do justice either to the subjects or the sovereign of another country for an injury done to them by the subjects of this: and it is fit, this should be done: for the constitution of this country does not allow the Crown to suppress by violence a person, who acts, as those parties did against the King of *Spain*: but the law only can give a remedy: therefore the Courts ought to be open to every one for that purpose. The Plaintiff as treating with the Company must be supposed to know the constitution of this country; and to have entered into these engagements with a knowledge, that he was treating with persons not amenable to the power of the Crown by summary process; but that he could have a remedy only by applying to Courts of Justice, which is his duty first instead of attempting to enforce it by the *ultima ratio regum*. *Grotius* says, the remedy ought to be against an individual aggrieving \* by a nation aggrieved; and war ought to be made only, if no other remedy can be obtained. It is objected, that your *Lordship* must for this purpose take into your consideration many matters not subject to the municipal law. That must often happen. The Court must often judge of treaties between sovereigns, where they create private rights, and make persons amenable as debtor and creditor. In cases of prize and capture


capture there are many instances, in which a municipal Court must consider the law of nations: *Reily's Plac. Parl.* and the *Banker's Case*. So it must often come in question upon the pay of troops, forage for the King's army, and other matters arising out of war and peace, and sometimes between two contending nations. There are many cases of this kind in *Molloy*, book 1. c. 1. s. 15. one particularly; that if captors have firm possession, a neutral nation cannot re-deliver: and 1 *Roll's Rep.* 175, and 3 *Bulst.* 28, are referred to. It was necessary there to determine, whether the King of *Spain* and Emperor of *Morocco* were at war, with other circumstances of the same nature, to see whether the King of *Spain* had a right to demand a ship taken and brought in here. Suppose by treaty between this country and another it was agreed, that men or ships should be furnished by this country to be paid by the other; that a considerable sum was advanced by the other country to the Commander to defray the expence; and that he returned to *England* without accounting; could not that be made a subject for the intervention of a Court of Justice, if the sovereign power so injured chose that method? Could it be refused, because the injury was done in the prosecution of a matter of state? Questions might arise between the Crown and the Company of the same nature with regard to the employment of the King's troops, &c. and informations might be filed for this purpose; and there is in one of their charters a petition for carrying into effect the agreements between them for the division of booty; which is a complete answer to their claim of independence. As to the objection, that the remedy is not mutual; it is not so in every case of the Crown in this country. The Crown may sue a subject in any Court; the subject can only sue by petition of right. So in the case of a Member of Parliament one party has an advantage over the other. So in the case of a Peer putting in his answer without oath. So in the case of a person not residing in the country: but that is from the nature of all jurisdictions: and there has always been this contract between all nations, that if a subject of one is indebted to another, the suit is to be in the country, in which the debtor is. If the Defendants have demands against the Plaintiffs, they have the same means of enforcing their demands; and may apply to the justice of the

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the Plaintiff, if a balance is found due to them. The Company is not in a higher situation, than Lord *Baltimore* was as to the province of *Maryland*. That territory was granted to him and his heirs; and he was constituted as to that a species of dependant sovereign, the head of that political constitution created by the King's letters patent. Almost all the powers of government were secured to him; the right of war and peace, of coinage, the right of granting dignities, and forming the administration of justice, which the Company have not, and every species of sovereign power except the supreme. Mr. *Penn* had powers nearly similar, though not quite so extensive. Upon a dispute between them as to their boundaries an agreement took place for adjusting their differences, and Mr. *Penn* brought a bill to compel specific performance. Lord *Hardwicke* determined, that it was a case, in which this Court could properly interfere to compel Lord *Baltimore* to perform, notwithstanding the degree of locality in the subject, because it was a matter of contract to be executed by the personal acts of the two parties: 1 *Ves.* 444. In this case there is no locality. So in the case of the Isle of *Sark*, 2 *Vern.* 494, such a plea was over-ruled; and the case of the *Earl of Derby v. the Duke of Athol* respecting the Isle of *Man* is in point: 1 *Ves.* 202. The objection as to the end of the cause and the inconvenience cannot operate now; but would come in question better upon the hearing, when the facts would have come out by the answer: but as to those arguments, your *Lordship* could not appoint a receiver of an estate in *Scotland*, *Ireland*, or *France*. The objection, that they may employ money recovered against this country would equally apply, if any private person owed money to the Plaintiff: but if it was to be refused on that account, it would not be by your *Lordship* refusing him the justice, he is entitled to, but by the interference of the executive power. As to their power to make war and take it back again, I do not dispute their power to rob any of the powers in *India*; but that is an odd reason to prevent the Court from decreeing them to pay their debts: and as to the objection from the right of the Board of Control to send out secret orders, that Board cannot prevent them from paying their debts; and such orders would be illegal. Perhaps some of those inconveniences may induce the Court finally

finally to give such directions, as will avoid them; or not to extend the decree to the length, they otherwise would: but that does not amount to this, that the Court cannot hold any jurisdiction upon the subject. The plea does not shew with sufficient certainty, that this relates to dealings and transactions not fit for the decision of a municipal Court. The words "relating to peace and war" are too loose. Contracts for arms, for money to carry on a war, &c. relate to peace and war; yet certainly they are the subject of municipal jurisdiction. By over-ruling the plea the Court will not injure the argument for the Defendant; for if finally they can shew, when the whole matter is before the Court, and the instruments read, that the Court ought not to proceed to a decree, they can then equally decide, that they will not, or modify it as they please. But the plea, if allowed, concludes the question; and determines, that a person in the situation of the Plaintiff cannot have redress from the municipal Courts of this country; but must at once resort to the sovereign power; if so, his redress must in this kingdom be by act of Parliament. The case made by the bill is merely that of debtor and creditor; and must be taken to be so, as the plea does not shew the contrary (64).

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(64) In the course of the argument for the Plaintiff the *Lord Chancellor* proposed, for the purpose of bringing the question to the point, that the Company should admit the agreement of 1781, and the fact, (but not so as to bind them) that 500*l.* is due upon a balance of accounts, and that they promised to pay that *ea ratione*; and that the Nabob should bring an action in the Court of King's Bench for that sum: then, the bill standing over, nothing would remain but the account and examination. His *Lordship* said, if the Defendants succeed in the King's Bench, they may plead with more confidence than now; if they fail there, the 500*l.* recovered will remain as a pledge: that if they could plead in the Court of law against this demand, they would have the same advantage of it there as here; and the Plaintiff could not go on with his bill: but if they could not answer it in an action, it would be very difficult to say, they could here. This proposal was not acceded to; the *Attorney General* saying, the Defendants did not mean to admit any thing to be due. The *Lord Chancellor* also observed, that the King of Spain had been once outlawed by *Sclden's* advice to prevent him from



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Attorney General, in reply.

The whole bill, agreements, and plea must be taken together; from them it will appear to be a foederal treaty not fit *for the jurisdiction of this Court. This description of it is a common subsisting treaty; which can be no other than a foederal treaty. The subject-matter of it is a contribution towards the current charges for the common defence of the country; and it is stipulated in it, that this agreement is to have the force of a treaty. It was not necessary to refer to the charters: enough was done by adverting to the acts of Parliament confirming those powers, of which acts the Court must take notice, and the very words of which we have adopted. It is impossible to conceive, the plea can relate to any other treaty regarding peace and war except with reference to the bill, plea, and agreements. They have a right to make offensive war, if conducive to their own existence having a right to attack and destroy. The more modern charters are as to both offensive and defensive war: the words are "and upon just cause to invade and destroy the enemies of the same." But this was a defensive war. If the bill had been brought in the *Mayor's Court* at *Madras*, the account would have been taken before a very inferior officer. Granting that a sovereign may sue, because he may waive his sovereign character, they have not shewn a case, nor can they, in which both parties were sovereigns. The cases of prize only shew, that there is a tribunal common to all nations, in which nation sues nation; in which matters arising from peace and war are settled by a law of convention between all nations, which for that purpose are but as one. But in those cases there is great difficulty, and the judges are in truth arbitrators. This Court could not do reciprocal and complete justice upon a treaty between the Company and any other country as *France* or *Spain*. Why was the *Dutch* memorial necessary: and why was not a civil action resorted to? Because the municipal jurisdiction was inadequate. There is great reason to


taking advantage of his suit: that	to take advantage of his suit.
the outlawry was bad enough;	His <i>Lordship</i> said, he could not
but good, until reversed; there-	quote a better book for this than
fore it was necessary for him to	<i>Selden's Table Talk</i> .
come in to reverse it, in order	

to believe, the Nabob knows nothing of this suit. But if the Court is of opinion, that the plea is informal, the Defendants hope, they shall be allowed to amend.

Lord CHANCELLOR.

Whether another plea ought now to be put in, or whether the Defendants shall be at liberty to amend, is a question different from that now before me; because no motion has been made upon that subject: and after having once given leave to amend I shall expect, that when another amendment is proposed, or a motion made for that purpose, the form of the plea, they intend *to put in, shall be ready: for, properly speaking, amendments moved in this Court ought to be stated, that the Court may see, whether it is proper, that the cause shall be farther delayed to introduce them (65). The argument, I have heard, is so very disproportioned to the state of the case before me, that in disposing of it according to my present opinion I need not go so far, as the bar have gone. Considering it in point of form and substance seems to me an inconvenient distribution; because I do not know where to find the substance of a plea but in its form; nor what to state as the intention of the parties, except what appears from their words: therefore the form and the substance as to this plea, and the argument I have heard, is the same. In a general view of this it is quite a new plea. It is stated to be to the jurisdiction: but it differs from those pleas in all the particulars, by which they are ever described; because it is truly observed, that it is impossible to plead to the jurisdiction of any particular Court without giving another remedy in some other Court: this is so far from shewing that, that it expressly says, the Plaintiff has no remedy in any municipal Court whatsoever: therefore I take it, this plea, if it means any thing, is in fact a plea in bar. Suppose the contract was gratuitous: suppose it was honorary; suppose it was that species of contract, upon which an action does not arise; and that it was necessary for the form of the plea to have brought into the view of the Court, that it was a demand of that description; the plea would have been a plea in bar of the action; and this is so, if any thing; and the whole argument tends to that end;

(65) *Wood v. Strickland*, 2 Ves. & Bea. 150.

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end; namely that, considering the situation of the parties, and the contracts as having a relation to that, such contracts do not give an action. That is a plea, which goes in bar. A plea to the jurisdiction of all Courts is absurd and repugnant in terms; for it is as much as to say, that the nature of the subject is such, as does not admit of an action. Suppose for example it was stated, that all the matters, upon which those in support of the plea rely, comprehend that species of treaty, which the law ought to pronounce impracticable for the cognizance of a Court of municipal jurisdiction: it is only saying, that an action does not lie; and therefore it is a plea in bar to the action. In order to consider it in that view it is material to see the real state of the record. The bill states, that the Nabob was either in debt, or that it was alleged by the Defendants, that he was in debt to them: that he acceded \* so far to the suggestion as to pledge the revenue of the *Carnatic*, of which he was sovereign prince, (for so in the latter part of the plea he is stated) and pledged it in this way; that he permitted them to take the revenue under an express promise, that they would account, and set the revenue against the allegation of the debt: I add those words, because upon the bill it might be doubted, whether they ought to be added: I think, they ought. The *Attorney General* passed over all that part of the bill, viz. the agreement of 1781, and confined himself to that of 1785, which the bill has not stated to be relative to the other, but as creating a contract perfectly distinct from that; and so far as is stated in the bill, it appears to be upon the part of the Plaintiff for providing four lacks of pagodas for the current expences, twelve lacks in application of payment of the existing debt, viz. that in 1785, and a certain or rather an uncertain other part to be applied to other occasions. It is impossible to get on with an account upon such terms as these, where neither party chooses to state, what those other occasions were; and I, who know nothing of these parties but from this bill and plea, do not know, what they might be: but still the observation, I make upon the agreement of 1785 as stated in the bill, holds; that in its foundation and effects and contingent consequences it is distinct from that of 1781. The bill proceeds to state, that the receipts made under the first agreement, have totally extinguished

guished that debt; and consequently that the Company ought to be accountable for those receipts, beyond what they can claim as a debt. The bill has purely stated this matter; that the Company having contracted with the Plaintiff as one private man with another private man, they have received by such means a sum of money, which will upon an account leave a balance due to the Plaintiff. It was not argued, that that standing by itself could have been demurred to. Upon the foot of that there would be a reasonable demand of an account. But it is argued, that there is enough in the pleadings to shew, this was a foederal agreement, which is not a very definite term; but means, I take it, a treaty between sovereigns concerning the public business of each sovereignty; and it is insisted generally, that upon such treaty so described (I choose to repeat it) a treaty between sovereigns respecting the public business of their respective sovereignties *actio non oritur*: and I state it so without using the words "peace and war;" because if you can go into that, and consider, whether the *actio* arises, I must \* not confine it; for it is impossible to make any difference between that and any other public act of a sovereign nation; therefore the position is, that wherever sovereign nations have contracted upon sovereign matters, the effect is a species of obligation, *ex quo non oritur actio*. To apply that to this particular case. They have stated the Plaintiff to be a sovereign of the *Carnatic*; and that by the law and municipal constitution of this country the Company having a right to make war for the defence and melioration of their trade are advised, that they being armed by the charters and municipal authority of this country with that power stand in all respects relating to the exercise of it in the same condition as if sovereigns. Without inquiring whether they are independent sovereigns, or whether they exercise a delegated sovereignty, neither of which can possibly be true, for they are neither the one nor the other, but mere subjects in that respect, and remain so in consideration of law to all purposes, the questions still remain, whether the circumstance of being armed with the authority to continue or make peace and war does not include an authority to make treaties of a foederal kind; and whether the treaties, they do make respecting the particular points, wherein they are authorized, viz. to make peace

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*East India Company* have neither an independent nor delegated sovereignty; but are mere subjects.

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Prize causes determined in municipal Courts not by consent of nations; for it is just cause of war, if their decisions are not agreed to.

Statutes of prize do not extend the Admiralty jurisdiction beyond its natural extent.

peace and war, do not for that single occasion put them in the same situation, in which sovereign powers are with regard to all treaties contracted between them respecting the interests of the sovereign body. If therefore both those points are made good, that in that case an action does not lie, and that this is an action arising in that particular case, the question then arises, how far they have brought themselves into that case. I should have wished, that consistently with truth they could have stated expressly and pointedly that particular situation, upon which, as I conceive, the question of the sort, I have stated, must arise, and without stating which, I think, it is impossible, it ever can; for if they contracted in any other shape or view than that, if they have not brought the case within that principle, I cannot supply that defect, and treat it just as if brought into that only predicament, in which any part of the argument, I have heard either this day or formerly, is applicable. To consider the case upon the question as I have now stated it; there are palatine jurisdictions, which are like kingdoms in all the subordinate situations, and perhaps as to peace and war. How far as to that would the Court have repelled a suit even if relating to peace and war? Upon that it is material * to consider, *quâ ratione* the Courts of this country enter upon questions depending upon such treaties. I do not take it to be true, as was said in the reply, that it is by consent of nations, that cases of prize are determined by a municipal jurisdiction. I know, there has been an opinion of that kind, which has been ably written upon, that there is such consent among nations (66), according to which our Court of Admiralty, which arises from commission under the great seal, interferes: but I take it, that it is a just cause of war, if their decisions are not agreed to by neutral states. The same jurisdiction is exercised in *Scotland* as in our Prize Courts in Courts of another jurisdiction; and it was found essentially necessary to make another act of Parliament, which only made prizes determinable there just as if here. The statutes of prize, I think, do not extend the Admiralty jurisdiction beyond the point, to which its natural jurisdiction extended before; therefore the circumstance of its being a treaty between nation and nation will not operate conclusively. However those

(66) Lord *Mansfield* was of that opinion, *Doug.* 616, 2d edit.

those cases may possibly be distinguished; for it may be contended, that where subjects of a neutral prince sue in the Admiralty Court, the foundation of the action is the private right of the individual; and consequently it will not come to the point of a determination between two sovereigns upon a treaty respecting their mutual sovereignty, nor the point, whether the Defendants having only private property of their own will be in that situation. The argument of inconvenience and the difficulty of making a decree, which has been used, is in my judgment not conclusive. First I dislike it, because it stands clear, of what I think, the fundamental principle, upon which the question will turn; and it is an argument, that sounds only in inconvenience. Next upon the question I am now stating, that *ex pacto tali non oritur actio*, it goes very naturally not to abridge the proposition, but to prevent the application of it; for it is one thing to say, whether I can decree a specific performance; another, whether they are to pay a debt actually contracted. I asked, whether in the case, I put to the Counsel for the Defendant (67), they could have pleaded to the action: I have not heard how. I now proceed to consider, whether this plea has brought the point to that ground, I took originally; that this was a convention by two *quasi* sovereigns respecting the public interests represented by him. To do that they have * pleaded in this form; stating, that by divers charters, deeds, and statutes confirming them, they have the sole right to trade to the *East Indies*; and to send men, ships, and ammunition to their factories for their security and defence; to choose officers, and to commission them to continue or make peace and war with any of the native princes and people not being Christians (which is the only material part, for those general powers only embarrass the material part) and this Plaintiff they have averred to be a sovereign prince and an infidel within the precincts of their trade. This they have done with this view; that from that power of making war without an express grant for the purpose it shall be inferred, that the Crown has granted a right of making treaties. It is not stated, that they do so; but they have left it to be inferred from having stated that other right. It is very important to consider, how far their foederal obligations, if they can do so, will bind the country.

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Acts done by subjects under powers given by the country bind the country; as signing of plenipotentiary in its own nature; though that is not now understood to bind till ratification.

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country. Where such a power to make peace and war is given, the effect of peace and war made by those, to whom it is given, will constitute a state of peace and war between the sovereign of the country giving that power to do such acts and the sovereign, with whom they are transacted. If they are empowered to make treaties to any extent, all the power of the country would be bound by the law of nations to the treaty so made. If the point were recent, in its own nature a nation would be bound effectually by the signing of a plenipotentiary; but that is certainly not now understood to be so till the ratification; for that is one of the terms contracted for in those treaties. The Defendants then say by their plea generally, that all the agreements, dealings, and transactions mentioned in the bill, without qualifying them in any other way, were done by virtue of the powers before mentioned. Then they proceed to state the only material part of the plea, that those dealings, &c. relate to matters transacted between them with regard to peace and war, and the security and defence of their territorial possessions generally. I have not heard it argued, that those words stand distributively; and that the plea relies as much upon the last part as the first. If it was confined to the last, the security and defence of their territorial possessions being no otherwise qualified may relate to many other dangers besides those arising from infidel princes living within the precincts of their trade. But suppose they had confined it within the first branch, namely, as to matters relating to war and peace: It is possible to say, that general phrase is a *sufficient description of those transactions to bring it to that point, that it is a foederal engagement by a sovereign concerning the public interests of that sovereign? It is impossible to say, the words will go near it even in that case; much less then as to those who have a more limited character, approaching sovereignty in no respect, but armed with this particular power for their own interest; but no otherwise within the law, which will govern it, except as in *pari ratione*. They say, that by deeds and charters confirmed by acts of Parliament they have such powers. That is not the manner of pleading. They must shew how; and state the powers given by the charters; that the Court may see, whether they have them or not. The act of Parliament is in its own nature
 a private

a private act; but I suppose there is a clause at the end declaring it to be a public act; but it does not follow, that I am therefore to take notice of particular privileges given by charters confirmed by such acts. Therefore the plea is in that respect also informal. But in drawing the plea they have not adverted to the most material consideration; namely, that every plea must tender an issuable matter; and upon the truth or falsehood of that it is to be decided; for here they tender certain facts for the Plaintiff to prove those facts true or false. Nothing is here tendered to him, upon which issue can be taken. There is no instance to be found any where of an issue at all parallel to this, of such general propositions tendered as a plea. Therefore the plea is bad in every view. Nothing is alleged to bring them into that situation, to which the argument will apply; and if they are, I will not now pronounce upon the point, which is very important. Though perhaps I suspect, that the Nabob knows nothing of this suit, I cannot take notice of that; for it is not pleaded; therefore I must take it to be his bill, while it stands upon the record in this manner. Considering it as the suit of the Nabob, no doubt it is difficult to sever the inconveniences from the rest: but let them be what they will, I cannot upon this record allow the plea; therefore let it be over-ruled.

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matter.

On the 30th *July* the *Attorney General* moved for leave to put in another plea; but the motion was refused. He then applied for time to answer: as the *distringas* might issue immediately; and that application was also refused (68).

(68) Post, Vol. II, 56. 4 Bro. C.C. 180.

THORP, *Ex parte*.

FROM the affidavits upon this petition, which were very numerous, it appeared to be occasioned by a scheme to procure a fraudulent commission of bankruptcy against two men,

bankruptcy, except those, who discovered and gave evidence: and the attorney deprived of the office of Master extraordinary, and committed.

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Costs as be-
tween attorney
and client
against parties
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men, named *Atherston*, for the purpose of defrauding their creditors. Several persons were concerned; among whom *Lightwood*, jun. was an attorney, and acted as attorney in the transaction, and made himself commissioner. His father acted as his clerk. At last *Hooper*, one of the parties, and the bankrupts made a discovery; and their evidence was made use of against the rest. The *Lord Chancellor* had upon a former day ordered *Lightwood*, jun. to be deprived of his office of one of the Masters extraordinary of the Court on account of his share in the transaction; and the parties were ordered to attend the Court personally, and were heard by Counsel and upon affidavits in their exculpation. *Lightwood* swore, he conceived himself to be acting in the usual course of his profession as a Solicitor. The petition was by the creditors of the bankrupts.

Solicitor General, for the Petition, said, he should not press for punishment; but hoped, for the sake of public justice, that the Court would read the parties to this business such a lesson, as would have the effect of preventing in future the swindling transactions, which under the name of commissions of bankruptcy were carried on in every county in the kingdom (69).

Lord CHANCELLOR.

It is of great consequence to public justice, that these abuses should not be practised; and it is clear here, that this was a fraudulent commission of bankruptcy, sued out without the least foundation, and without the least view to any other purpose than to clear these two bankrupts against all their creditors. The only question is, how far the several parties knew, it was so. The discovery has come from *Hooper*, a partaker and accomplice; and his evidence ought to be regarded in the light of the * evidence of an accomplice; therefore he would not be entitled to credit, if the conduct of the rest had afforded even a slight ground of fairness. The same observation applies to the evidence of the bankrupts themselves; for they joined in the fraud, and concerted the means of imposition. Upon the other hand it is clear, that the attorney, who

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who negotiated this business, must have known, the subject was a fraudulent commission. Next it is clear, they transacted it with a view to effect a fraud; and took very gross means to do so; which appears from the manner of conducting the business from beginning to end. Supposing those things true, which are proved false, their account is, that a man came them to take out a commission against two persons, he named; and without examination as to the nature of the debt, of the trading, or of the act of bankruptcy, they proceeded to take out the commission; a conduct, which, whatever they may think of it, if they are serious in their affidavit, is the most infamous and reproachful, that can be imputed to them; and the observation is very just, that to swear they look upon that conduct, which they avow, as in the common course of their possession, is an aggravation. Therefore with regard to them it is impossible to be content with saying, they deserve reproach, and that a lesson ought to be read to them; for a lesson to such persons is most idly thrown away, and would be ridiculous. The part, the others have taken, is also too manifest. When the whole matter was blown up, if there had been any honesty in the parties, or any foundation for their pretences, the proper thing was to give up the commission, and join against *Hooper* and the bankrupts, who had drawn them in. Instead of that they have endeavoured to support it. Therefore let it be referred to the Master to take an account, as between attorney and client, of all costs the petitioners have been put to, to be paid by the two *Lightwoods* (70), and all the parties (71) except *Hooper* and the others, who came forward. It is expedient for justice, that upon that account they should be excepted; as their evidence was used against the rest. But all the rest must pay the costs; and the two *Lightwoods* stand committed.

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(70) *Beames on Costs*, 143. (71) As to the Bankrupts, *Post, Ex parte Conway; Ex parte Heywood*, Vol. XIII, 62, 67, and the note in page 64. *Ex parte Arrowsmith*, XIV, 209. *post, Ex parte Shaw*, Vol. II, 40. *Ex parte Bromley*, III, 40. *Beames on Costs*, 329, 330.

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FREDERICK v. HALL.

Nov. 25th.

Plate excepted from bequest of personal estate to wife, after her decease over, and recited to be hereinafter given to daughter, but not farther noticed: undisposed of.

TESTATOR bequeathed all his personal estate, except his plate, "which is hereinafter given to my daughter," to his wife with limitations over after her decease. He took no farther notice of his plate. The question was, whether it was sufficiently devised to the daughter; or whether to be considered as undisposed of.

Lord CHANCELLOR.

I cannot say, the plate is disposed of by his will. I see no manner of giving it to the daughter, nor any implication to arise for that purpose. *Non constat* whether it is to go over by executory devise like the rest of the property, or to be to her absolutely. I cannot say, there is such an executory devise of it over; but if I give it to her, must give it to her absolutely. Suppose the words had been "which is hereinafter disposed of to" any stranger, or to a school, &c. those words, though used in the present tense, cannot under that context be a disposition. Therefore it must be considered undisposed of (72).

(72) 1 P. Will. 59. *Wright v. Wyvill*, 2 Vent. 56. *Right v. Hammond*, 1 Stra. 427.

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Nov. 25th,
28th.

GREEN v. CHARNOCK (73).

To entitle Defendant to security for costs it is not sufficient, that Plaintiff appears by the bill to be out of the jurisdiction: he must appear to be resident abroad: then it is of course.

MR. *RICHARDS* moved, that the Plaintiff should give security to answer costs, upon the ground, that, as he stated himself to be at sea upon a voyage to *North America*, he stated himself to be out of the jurisdiction of the Court.


Solicitor General and Mr. *Abbot* opposed the motion, as the Plaintiff intended to return; and was only gone to procure evidence in the cause.

Lord CHANCELLOR.

If he was upon a voyage to *Ireland*, he would be out of the

(73) 3 Bro. C. C. 371. 2 Cox, 284. 2 Dick. 775.

the jurisdiction of the Court. The true question is, whether he must not be resident out of the jurisdiction. If he had stated himself so, the motion would have been of course, and no notice necessary: but here the Defendant thought himself obliged to give notice. In order to entitle himself he must raise the idea, that the Plaintiff is gone to avoid the award of the Court, or with a view not to return.

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The *Lord Chancellor* declared himself to be decidedly of this opinion: but as Mr. *Richards* had made the motion for Mr. *Lloyd*, and expected, that it would have been of course, it was at his request permitted to stand over.

On the 28th Mr. *Lloyd* moved it upon affidavit of the fact stated in the bill. He cited Lord *Hardwicke's* words, *2 Ves.* 24, "if upon the face of the bill Plaintiff appears to be beyond sea, you may apply for security to answer costs."

Solicitor General, for Plaintiff, agreed to give security.

Lord CHANCELLOR.

From what inquiry I have made, the statement in the bill is not a sufficient foundation for this motion. The words of the order upon the motion of course are, that he "lives abroad." You are catching Lord *Hardwicke* by those words; for in that case the Plaintiff stated himself in the bill to be resident abroad. You do not mean to say, that if he was fishing, or a sailor going backward and forwards, he must give security. The general rule, as I conceive it, is, that the Plaintiff must appear to be resident abroad. I only want to settle the general rule; for it is nothing to this motion, to which there is now no opposition (74).

(74) Post, *Scilar v. Hanson*, *Hoby v. Hitchcock*, Vol. V, 261, 699. *Beames on Costs*, 187.

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Nov. 28th. 

Witness examined before decree, but then accidentally and without fraud incompetent, on motion allowed to be generally re-examined after decree, upon interrogatories to be settled by the Master: but if competent at first, second examination can be only to matter substantially different.

SANDFORD v. PAUL (75).

A WITNESS in this cause had given evidence under a release executed by him, which by mere accident did not cover a very small debt due to him, in respect of which he was interested at the hearing, and therefore incompetent. After the decree a motion was made to re-examine him as a witness in the cause.

Solicitor General, against the motion.

The rule of the Court, where a party wishes to examine a witness after a decree, who has been examined in chief, is, that it must be by leave of the Court; and the point to which they wish to examine him, and the circumstances making a re-examination necessary, must be stated. *Sawyer v. Bowyer*, 1 *Bro. Ch. Ca.* 388, on motion to suppress depositions taken without an order before a Master, to which the witness had been examined in chief, the Court held, he was not to be examined before the Master to the same matter, to which he had been examined in chief. In *Vaughan v. Lloyd*, 1st February, 1787, the Court held the same doctrine. The rule is founded upon this; the Court looking upon the re-examination after a decree of a witness, who has been examined before it, as dangerous to justice, leaves it to the Master, and trusts him with settling the interrogatories. On these motions the former depositions are always disclosed to let the Court see, whether the re-examination is necessary. This is the case of a man, who could not be a witness, because he had an interest; but there is equal danger in this case; for the parties have nothing to do but to examine him knowing him not to be competent, and get him to release after the decree; and they may then frame their interrogatories, knowing what he has said, and what he will say, Suppose nine out of ten interrogatories not to relate to the matter of the decree made, and calculated to induce the Court to make another decree; this would not be permitted as to those nine, though it might be doubtful as to the tenth. The Court refused to make such a decree, as would have been made, if this evidence had been read; and the question is, whether the Court will let this useless evidence be read. It would

(75) 2 *Dick.* 750. 3 *Bro. C. C.* 370.

would do no good; and therefore he ought not to be examined again. If the Court thinks, that where a witness is incompetent on account of interest, without practice and supposing it by accident, he may be examined after as before a decree, then they must exhibit interrogatories. My reason for objecting is, that nine-tenths of these depositions have no relation to the decree; and if they are made evidence, I must move to suppress them.

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The principle is, that where a witness has been examined upon interrogatories before, and has deposed in a manner less favourable, than the parties wished, they shall not force him by new interrogatories so as to lead him to do any thing wrong in that respect. It is clear upon the substantial merits, that it is essentially necessary to justice to let in this evidence. On the other hand it is convenient only to let it in upon the point decided. In the case cited the objection of the Court was this; you shall not examine the same witness upon interrogatories put before, because you have got his deposition as originally given upon them; secondly, you can have no object in making him swear again, but a hope that he may vary. The Court inclined upon substantial justice, if it appeared, the parties wished a witness to be examined to new matter, to allow interrogatories substantially different to be put; and imagined it might be done without application; but corrected themselves upon observing, that the contrary had been solemnly determined. It must then be upon the ground, that they are substantially different. But in this case the general rule does not apply; for though it is true, the witness has been examined before, the point raised here is some slight interest, that he had. They will be to examine to all the matters examined to before. I cannot then rule, that this witness shall not be examined; as to do so I must determine, that he shall not be examined, though competent, because not competent at the hearing. I agree, that in principle the danger is the same, whether the witness was competent at first or not. I also think, that if I had reason to suspect, that by any other thing than a slip they had so examined him, I would not allow another examination; for if they had managed it in that way, the least, they ought to

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to lose, would be the benefit of that examination. But it is not alleged, that they examined him with that view. If he had been competent, at the time he was examined, and the desire of the parties had been to examine him to new matter, to which only he ought to be examined, that practice of stating the points not examined to before might have been deemed a reasonable caution by the Court, that they might see the occasion to examine him upon the new matter. But what the course of the Court would be in that case, does not relate to the present, which is professedly to examine him upon the very point, to which he was examined before, stating that he was examined under a release, which by accident did not cover all the interest, he had. But if that was an accident, the parties should not suffer. If you can prove, that though they expected it to cover the whole, yet because it did not, they are therefore to lose the whole benefit of his testimony, then they ought not to examine him at all. Suppose the witness had not been examined at all before the decree; but after it a proposal is made to examine him upon certain interrogatories; and the Master finds them impertinent to the decree; it would be impertinent to the cause then; and the way interrogatories are treated, if impertinent to the decree, seems to be the manner, in which this must be come at. If they turn out to be impertinent, they must be suppressed. If I can be convinced, that this is such an objection to his examination, now he is competent, that is a question *seorsim*; and in that case he ought not to be examined at all. Neither can I confine him to the matter not examined to before; because his first examination failed by accident. Then he falls into the class of all other witnesses; and if the interrogatories are impertinent to the matter, they ought to be suppressed.

Impertinent  
 interrogatories  
 suppressed.

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There was some dispute, whether the interrogatories in these cases ought to be settled by the Master. Mr. *Mansfield*, for the motion said, there was not a word about that in the cases cited; and that the Master must examine into the whole merits of the cause, before he could take upon him to settle them.

*Lord* CHANCELLOR only said, he did not think it signified, whether they were settled by the Master or not; and that it must depend upon the practice.



The interrogatories were afterwards ordered to be settled by the Master (76).

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(76) See *Sandford v. Paul, Powell*, 1 *Mer.* 130. *Bott v. 3 Bro. C. C.* 370. 2 *Dick.* 750. *Birch, Swinford v. Horne, Asbee Callow v. Mime*, 2 *Vern.* 472. *v. Shipley*, 5 *Madd.* 66, 379, 467. *Post, Ingram v. Mitchell*, Vol. V, *Smith v. Graham, Vaughan v. 297. Smith v. Althus*, XI, 564. *Worral*, 2 *Swanst.* 264, 395; and *Kirk v. Kirk, Greenaway v. the notes. Cox v. Allingham, Adams*, XIII, 280, 285, 360. 1 *Jac.* 337. *Ord. Ch. Mr. Beames's Purcell v. M'Namara*, XVII, ed. 74. 2 *Ch. Ca.* 217. *Prac.* 434. *Birch v. Walker*, 2 *Sch. & Reg.* 420, Mr. Wyatt's ed, *Jef.* 518. *Lord Abergavenny v.*

PRICE *v.* WILLIAMS.

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*Dec. 9th.*

**P**LAINTIFFS, claiming as purchasers, filed a bill; and obtained an injunction against Defendants, who had got a verdict in ejectment against them. The cause came on in *Trinity Term*; and upon a defect of parties was permitted to stand over. A motion was made, that the injunction might be dissolved, or a receiver appointed, upon affidavits of waste; which was denied by affidavits on the other side, and even from those of Defendants appeared to be trifling.

Injunction cause stood over at hearing for want of parties; injunction not dissolved nor receiver appointed on motion without special case of waste: but Plaintiff compelled to speed the cause.

*Solicitor General*, for the motion

Said, the Court would interpose to prevent the estate from being injured by an abuse of its process, particularly after the indulgence, which had been shewn to the Plaintiffs by allowing the cause to stand over.

*Lord CHANCELLOR.*

I cannot go out of the way by appointing a receiver *in hoc statu* upon the common allegation of waste. The Defendants have no fixed equity. The Plaintiffs have obtained an injunction. While that stands, the matter is still *sub judice*. If any special case was made, as that the estate was likely to be ruined by the mismanagement, as if there was a mine, and they were proceeding to ruin it, in such a case as that the Court

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Court would be inclined to go a little out of the way, and would press hard against form. However the Plaintiffs must bring on their cause, and not hang it up in this way for ever. I will certainly provide some remedy for that. Half a year is a long time to take to make parties.

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Plaintiffs then agreed to speed the cause.

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DIXON v. PARKS.

Plaintiff can in no case dismiss his bill without costs: with costs it is of course: but after motion to dismiss without costs refused consent is necessary.

**MR. MANSFIELD** moved; that Plaintiff might be at liberty to dismiss his bill without costs on the ground, that some bonds, which were the object of it, had been since found; and therefore he had a remedy at law.

**Lord CHANCELLOR** refused the motion immediately, saying he could not conceive a case, in which a Plaintiff could dismiss his bill without costs; that to dismiss it with costs was a motion of course; but that he could not then dismiss it without consent (77).

It was dismissed with costs by consent on paying the costs of the application.

(77) Ante, 140. See the note, 141.

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Dec. 12th.

3 Bro. C. C. 388.

JORDAN v. SAWKINS.

Plea of Statute of Frauds a good defence to parol variation of agreement for a lease: not, if it only amounts to waiver of part, or to a declaration of trust.

**THE** bill stated, that the Plaintiff *Mills* and the Defendant executed an agreement in writing, by which *Mills* in consideration of 300*l.* to be paid to the Defendant, 10*l.* of which was paid in part-performance, and a receipt signed purporting to be for that sum as part of the 300*l.* was to take from the Defendant a lease of a public house for 21 years to commence from *April* at a rent of 40*l.* a year; that afterwards an alteration was made with consent of all parties by varying the time, at which the term was to commence from *April* to *June* in the same year; that it was also varied in this respect; that *Mills* was to take it, not for himself, but as trustee for the

the two other Plaintiffs. These variations were not put into writing. The bill also stated, that a lease according to the terms of the agreement with the alterations agreed on was presented to the \* Defendant, who refused to execute it. The bill prayed a discovery and specific performance; and that the lease might be made either to *Mills* as trustee for the other two Plaintiffs or to the *cestuys que trust*. As to so much of the bill as sought the discovery and relief upon the foot of the variations with regard to the commencement of the term, and the alteration of the tenants, the statute of frauds was pleaded. An answer was put in insisting, that the Plaintiff intoxicated the Defendant (78); and got him in that state to execute the agreement; and that the consideration was very inadequate, the premises being worth 60*l.* a year.

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Mr. *Lloyd* and Mr. *Abbot*, for the Defendant.

The agreement to alter the time of commencement of the lease and the parties to take it was quite a new agreement; and not being in writing, and nothing being done in part-performance, it is within the statute.

Lord CHANCELLOR.

You do not mean to stand upon the alteration of the parties.

For Defendant.

No: we do not stand upon that. It certainly was competent to him to declare himself a trustee. But upon the other ground the Plaintiffs must depend upon the first agreement, to which there is a complete answer, If the second agreement relates to the former, it must relate to it either by varying it or adding to it. In the former case the plea is clearly good. A written agreement cannot be altered by parol, *Cookes v. Mascal*, 2 *Vern.* 34. If it relates to it so as to make it part of the same agreement, an addition by parol to a written agreement is not helped; *Com. Dig. tit. Chancery Agreement*, 2 *C.* 4, upon the authority of 2 *Cas. Chan.* 142. In *Brodie v. St. Paul* in this Court about six months ago (79), Mr. Justice *Buller* sitting for your Lordship dismissed the bill upon the same ground.

(78) 1 *Ves.* 19.

(79) *Ante*, 326.

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*Solicitor General* and *Mr. Stanley*, for Plaintiffs.

The bill considers this not as two agreements, but as a written agreement varied only in one of the terms, since it is now admitted, that *Mills* acted as trustee. There is no case saying, that parties having entered into a written agreement may not change one of the terms of it. Ever since *Legal v. Miller*, 2 *Ves.* 299, it has been clear, that the whole may be waived by parol; and the question here is, whether they may not alter one thing letting the substance stand; and the variation proposed is very immaterial. *Brodie v. St. Paul* is not applicable. The question there about the covenants to be inserted in the lease depended entirely on parol evidence. The lease was to be made upon such of the covenants, as were read on a particular day; and parol evidence was to decide, which were read. *Cookes v. Mascal* is not an authority. It was not upon a plea. There was no fixed agreement, but only a letter; (which has, I know, in many cases been supposed to take it out of the statute;) and it came on again in the same book, 200, when the Court ordered the agreement to be performed upon the circumstance that an offer was made by the answer to perform it. The plea is very indistinct; because the bill does not pray this as a new agreement, but only as a variation in one term of a written agreement, which all parties intended to stand except in that single particular,

*Lord* CHANCELLOR.

If the second agreement had been, that the lease should commence from *June*, and continue, not for 21 years absolutely, but for 21 years to determine in *April*, it would do; because it would be no variation, but only waiving a part. But as it is, Plaintiffs must go upon their old agreement (80).

(80) *Robson v. Collins*, post, Vol. VII, 130.

HILL v. CHAPMAN.

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3 Bro. C. C. 301.

New Plaintiff by supplemental bill may impeach a decree upon rehearing on petition of former parties.

Legacies in trust for all grandchildren then in existence by name, to sons at twenty-three, daughters at twenty-one, mesne interest for education, surplus to accumulate; with survivorship: residue for all the grandchildren generally for their benefit "as aforesaid." By codicil a fund set apart to pay life annuities, grandchild born after testator's death not entitled to a share of the residue; into which the fund under the codicil falls after the purpose answered.

**T**ESTATOR gave by will specific legacies of stock in trust for such of the children of his daughter *Sarah Hill*, as were then in existence, by name; and directed the respective shares to be transferred to the sons at 23, to the daughters at 21; the trustees to receive the interest and dividends in the mean time; and to apply them to bringing up the children; and to place out the surplus beyond what should be necessary for that purpose at interest in some of the public funds to accumulate for the legatees, till they should attain the age, at which their respective legacies were to be transferred: provided, that if any or either of his said grandchildren should die before their respective portions should be transferable or payable, their shares should belong to and be divided among all the children of his said daughter born of her body, living at the death of the said grandchildren so dying. He then gave all the rest and residue of his estate and effects whatsoever and wheresoever in trust for all his grandchildren by his said daughter to be applied for their benefit "as aforesaid." Afterwards by a codicil he gave some annuities for life, and directed, that 1000*l.* should be set apart after his decease to pay the said annuities; and that the dividends and interest should be so applied, as they should grow due and payable.

After a decree establishing this will, and directing that fund of 1000*l.* to fall into the residue after the purpose, for which it was given, should have been answered, a supplemental bill was filed by a child of *Sarah Hill* born after the death of the testator, but before that of the annuitants by the codicil: and upon a rehearing on the petition of the other parties to rectify an error in the decree in not having made a declaration as to the residue, Mr. *Mitford* for that child claimed a right to object in his favour to the decree. The *Lord Chancellor* agreed, that he might; as the supplemental bill brought before the Court a new party to agitate a new right.

Mr. *Mitford* and Mr. *Cooke*, for the child born after testator's death.

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This child is entitled to some benefit under the disposition of this residue; though it is difficult to say, he is to take an immediate interest. The testator seems anxious, that all his grandchildren should take. The disposition in case of the death of any of them will take in children born after as well as the rest. However I do not find words to postpone the distribution, unless the phrase "as aforesaid" is sufficient. From that phrase it is necessary to go to the clauses, by which he has provided for the grandchildren, to which those words must, and only can refer. If that reference will not have the effect of postponing the distribution, still the share, each is to take in the residue, must be governed by all these clauses with regard to the division and laying out of the fund; and if any die under the age, at which their shares are payable, this child might take a share of the residue in that form. As to the 1000*l.* set apart by the codicil to secure the annuities, the decree ought not to have directed that to fall into the residue, after that purpose should have been answered; for the codicil stops short without giving any such direction. Then this is the same, as if this sum was given to the annuitants for life, and after their death to be distributed among the children of Mrs. Hill. Until their death it cannot be distributed. At the time it was to be distributed this child was one of her children. As the distribution of this part is suspended by the codicil, and he was born before the event, he will at least be capable of taking a share of that: *Ellison v. Airey*, 1 Ves. 111. In that case also Lord Hardwicke answers the argument in favour of the children *in esse* at the making of the will, because the testatrix had taken notice of and given by name to them, by observing that it held the contrary way; for when she intended them a particular benefit, she named them; when she had no such intention, she used general words. *Attorney General v. Crispin*, 1 Bro. C. C. 386, several annuities were given by will; and after the decease of the annuitants 50*l.* each to the children of D. He had then seven; and a daughter was born after the death of the testatrix, but in the life of the annuitants. Six died in the life of the annuitants. Your Lordship held, that the child born after the will might take a share. This is strong to shew, that in this case the shares do not vest till after the death of the annuitants.

Mr. Mansfield, for the children living at testator's death.

Ellison v. Airey went upon the particular penning of the will. In this case there is no gift over of any sum first given for life (81). But testator has by general words given all the residue. It is true, that by a subsequent codicil he has taken out of it a life interest in 1000l.: but he has not altered the disposition made of the residue: therefore if that is to go to the grandchildren living at his death, the codicil cannot affect the disposition of it. There is no case, where upon a general disposition of a residue a difference has been made between the bulk existing at the testator's death, and that which becomes so afterwards by life interests, to which it was appropriated, ceasing at a certain time.

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If I enlarge the intention of the testator by imputing to him a view of providing for all the children, I shall contradict a rule, which has stood too long to be shaken: but which when first raised went *satis ex arbitrio*; because the intention might go to all possible children, as in marriage settlements; and to impute to him such a restrained intention is rather a forced interpretation, and generally against the intention he conceived at the time. Is there any case of a specific gift to answer an annuity, with directions that afterwards it shall fall into the residue, and that is given so as to go to those alive at the death of the testator, where a difference has been made between them? The Court must hold the whole to be divisible at his death; for it is repugnant to say, one part of the residue so given is to go one way, the other part another; and here is a general bequest of a residue, which, you agree, must be distributed at the death of the testator. Therefore if it had been a bequest by the will, it would hardly have done. The codicil must work but little difference; for a codicil is always considered as part of the will (82); and the intent is drawn from the whole. This fund therefore must fall into the residue. How would it be, if a child had been born within a year after the testator's death? Here the whole inference, that excludes the after-born child, is the circumstance of a distribution being necessary *ex vi terminorum*

Codicil considered as part of the will, and intent drawn from the whole. Legacies not distributable till a year after testator's death.

(81) 1 Ves. 210.

(82) *Crosbie v. Macdoul*, post, Vol. IV, 610.

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notum upon the death: but it is not necessary *ex vi termini* till a year after. *Ellison v. Airey*, which I have often had occasion to consider, went upon a refinement; but cannot now be shaken (83):

(83) *Heath v. Hedth*, 2 *Atk.* 382. 1 *Ball. & Beat.* 483, 485, 121, where the cases are collected by Mr. *Sanders*. *Coleman v. Seymour*, 1 *Ves.* 209. *Horsley v. Chaloner*, 2 *Ves.* 83. Post, *Spencer v. Bullock*, Vol. II, 687. *Taylor v. Langford*, *Hoste v. Pratt*, III, 119, 730. *Corbyn v. French*, IV, 418. *Middleton v. Messenger*, *Mills v. Norris*, V, 136, 335, and the note in p. 140. *Godfrey v. Davis*, *Barrington v. Tristram*, VI, 43, 345. VIII, 380. *Whitbread v. Lord St. John*, X, 152. *Gilbert v. Boorman*, XI, 238. *Hughes v. Hughes*, *Davidson v. Dallas*, XIV, 256, 576. *Walker v. Shore*, XV, 122. *Defflis v. Goldschmidt*, XIX, 566, and the note 568. *Smith v. Streutfield*, *Mogg v. Mogg*, 1 *Mer.* 358, 417, 654. 2 *Mer.* 382. 1 *Ball. & Beat.* 483, 485, *Crone v. Odell*. *Scott v. Harwood*, 5 *Madd.* 332. *Browne v. Groombridge*, 4 *Madd.* 495. *Hutcheson v. Jones*, 2 *Madd.* 124, *Tebbs v. Carpenter*, 1 *Madd.* 290. The distinction appears to be, that a legacy to the children of another person is confined to children living at the testator's death, the period of distribution, unless a future period seems intended; as if a previous interest for life is interposed; and, if the children are to take at a particular age, the attainment of that age by one fixes the proportions; and children, born afterwards, are necessarily excluded: *Prescott v. Long*, post, Vol. II, 690; XIX, 570. *Curtis v. Curtis*, 6 *Madd.* 14.

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Dec. 14th.

KAYE v. POWEL.

Trustees, who joined with remainder-man to eject cestui que trust for life, not excused from making good the whole rent reserved by subsequent accidental deficiencies. •

TRUSTEES joined with a remainder-man to put his mother, who was tenant for life of the estate under the trust, out of possession; and they went round together to the tenants; and desired them not to pay her any more rent. The trustees produced evidence of subsequent failures of tenants, &c. which occasioned a deficiency in the rent.

Mr. *Mansfield* and Mr. *Graham*, for the Trustees

Admitted, that they had acted improperly; but said, that the subsequent events ought to be taken into consideration; and

Inquiry directed as to the interference of remainder-man.

and that they ought only to be compelled to make good what would have been the actual receipts of the tenant for life, supposing she had continued in possession, not the actual rent reserved; that as there was no *lata culpa* in the trustees so as to draw on them severe censure, the Court would inquire into the reality of the transaction.

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~
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Lord CHANCELLOR.

The conduct of these trustees cannot be justified; and this Court cannot sit by, and see them act in such a manner. After they have actually ejected their *cestuy que trust* by collusion with the remainder-man the question is, whether the rule, by which I am to restore the *cestuy que trust*, is, what the estate might possibly have been let for and have produced afterwards, (for which I must enter into all that discussion) or whether I should not take it up the shortest way by saying, that it was the fault of the trustees to meddle with the business at all; and therefore they must make it good according to the terms of the contract. I think, if people will totally turn another out of possession of * an estate let for a certain sum, my business is not to inquire into subsequent circumstances; but whether that is not the sum, from the receipt of which the party was turned out. The true rule is to make them pay, what the tenants are bound to pay. Let the Master compute the loss according to the leases existing at the time; and also inquire, in what manner the remainder-man interfered with the trustees in taking away the possession from his mother during her life.

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ANONYMOUS.

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Jan. 16th.

AFTER answer a motion was made for Defendant, that Plaintiff should name a new next friend of sufficient ability to pay costs. It was supported by affidavits stating, that when the answer was put in, Defendant had not found out the next friend, who now turned out to be a woman worth nothing; and supported by theatrical charity.

After answer Plaintiff not compelled to change the next friend on affidavit, that she was worth nothing, and

not found till after answer; contradicted by her swearing to 44l. a year. Defendant ought not to have answered; but should have said, he could not find her.

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ANONYMOUS.

Mr. *Abbott*, for the motion admitted, that the rule laid down by Lord *Hardwicke* in *Meliorucchy v. Meliorucchy*, 2 *Ves.* 24, as to the cases, in which Defendant might require security for costs, was, that the application should be made before answer, if the circumstances were known.

On the other side were produced affidavits, stating that the next friend had a clear income of 44*l.* a year: and denying that she had ever received or solicited any charitable support.

Lord CHANCELLOR.

The Defendant has a more satisfactory account now, than he had at first. That circumstance, that he could not find her, would have been a better ground, than that he has found her with such an income. But I doubt about the original motion. I doubt, whether a next friend ought to be discharged on account of poverty more than a principal. The principle, upon which a Plaintiff if poor would not be deprived of the opportunity of applying here for justice, is similar to that of getting a *next friend to sue. Suppose an infant had a father, who is the natural friend to sue for him, would the Court refuse to hear that father? But here Defendant need not have answered, but should have said, he had taken pains to find out the next friend, and could not. I do not incline to put the Plaintiff under the necessity of naming another. It is very clear, a next friend would not be allowed to sue *in formá pauperis* (84). Suppose they cannot get another: I must dismiss the bill with costs against the present next friend, because she cannot prove herself to the satisfaction of the Master to be able to pay them. But Defendant ought to have applied at first; for then he would have had a much better case. I think, it is very dangerous to displace a next friend; though perhaps a case may be gross enough for it. But here every thing is in favour of the next friend, who swears affirmatively, that she has 44*l.* a year: while the Defendant only swears negatively.

Next friend cannot sue *in formá pauperis*; but ought not to be discharged for poverty: dangerous to displace him; though perhaps there may be a case gross enough for it.

The motion was refused (85).

(84) Nor an executor, &c. (85) In what cases the next *Paradise v. Sheppard*, 1 *Dick.* friend will be changed, see post, 136. *Beames, on Costs*, 124. *Witts v. Campbell*, Vol. XII, Appendix, No. 21. 493, and the note.

HABERGHAM *v.* VINCENT.

1792.

Jan. 31st.

ON the 5th of *October* testator by will, executed in the presence of three witnesses, limited particular estates to trustees, with directions to convey according to the trusts specified; and concluding with a remainder to such trusts as he by any deed should appoint. The next day by deed, attested by two witnesses, he appointed the rest of the uses; the last of which was to the right heirs of the trustees or the survivor. All the preceding limitations having failed, the fee was claimed by the surviving trustee (86).

Devise, properly attested, of land upon several trusts; remainder to such trusts as testator should by any deed appoint: whether land would pass by the deed of appointment sent to law upon a case, stating the devise to be to uses.

Lord CHANCELLOR.

The question with regard to the conveyance to these trustees cannot arise, until it is decided, whether the deed under the circumstances carries any interest in the land. It was properly argued, that the will had not raised any estate to any person; and that at the death of the testator the estate was wholly *untouched by the will. If it operates at all in this case, it must be directly by way of disposition. In respect of that the outside, to which the argument by authority and example has been able to go, is, that, where a man devises to trustees to pay debts, debts, contracted after the date of the devise, have been in this Court made a charge. The generality of the word "debts" has served as a foundation for that. The same thing has obtained as to legacies: and it is now the settled course of the Court, that where a man devises in trust to pay debts and legacies, whether they exist at the time of the devise, or in any way, that the Ecclesiastical Court will establish, it is sufficient to create a charge. The analogy, arising upon those two cases, is the utmost, to which the argument proceeds in point of authority. There are cases, not contradicted either at the bar or by the Bench, in which it is said, that if a man charges an estate with a sum of money, reserving to himself the right of saying, how it shall be disposed of, he may dispose of it without a will executed in the presence of three witnesses. That has been asserted, but never decided in any case, that

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Land devised in trust to pay debts and legacies, charged with all, that the Ecclesiastical Court would establish.

(86) The case is stated at large in the subsequent report, post, Vol. II, 204.

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Deeds testa-
mentary in
their nature
often required
to be proved
as such.

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that I know: so it is not an authority. The operation of a deed upon a will is found in the only case upon the subject, *Metham v. the Duke of Devonshire*, 1 *P. Will.* 529, but that was a will of personal estate. The deed was executed in this Court: and, if the report is correct (87), these observations arise upon it: first, that it was considered in this Court as a deed; and, being so, the will was deemed to operate upon it *ed formá*. That is a peculiarity; for the will at the execution of that deed was nothing; therefore, supposing it to operate as a deed, and that was considered as the basis of it, the Court will even in that case go a great way to establish this principle; that a will, though it does not operate, or move the interests of the testator in his life, yet is sufficient some way or other to give to the deed that effect, it owes entirely to the will. But I suspect, if that case is examined, so will turn out, that, being a devise of personal property only, that deed, which is in its own nature testamentary, was proved: and there are a number of cases, where such deeds are required to be proved as testamentary. At all events that case falls short * of this; because a deed, executed in the presence of two witnesses, was more than was necessary, if they had gone to the proper tribunal; and it was only personal estate. But this is a question perfectly new; and must cover all other cases both at law and in equity upon wills; and it is not proper to make a decision upon that head in a totally new case. Therefore a case should be made, stating it to be a devise to uses, not to trusts, similar to what Lord *Talbot* once did (88), and then stating the question, whether that deed would be sufficient to govern the uses; which would bring that question before the Court. If that is decided against the will, the consequence is plain, and will dispose of the whole case: if otherwise, then and then only will arise the question

(87) See the difference between the report and the extract from the Register's book in the 4th edition of *P. Will.* According to the report the question, whether children born after the will was made, but living at the execution of the deed, should take, was negatived, because the deed was to be taken as part of the will: by the Register's book they were held to be entitled for the same reason.

(88) *Sabbarton v. Sabbarton*, *For.* 250. *And.* 335. 3 *T. R.* 148. 4 *T. R.* 710.

question as to the estate given to the trustees; into which I will not enter now. The proper thing now is to have that case made, and to reserve farther considerations upon it.

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On the 14th of *May*, 1792, an addition was on motion made to the case to be sent to law, in order that, if the Court should decide in favor of the deed, they should also certify, whether the deed and will are to be considered as one instrument.

The foundation of that application was, that, though the estate to the trustee should be void as a contingent remainder on account of the failure of the particular estate, yet the limitation to trustees with directions to convey would support it in equity (89).

(89) Post, Vol. II, 204.

DELMARE v. ROBELLO.

1792.

Feb. 3d.

3Bro.C.C.444.

TESTATOR in 1785 bequeathed the residue of his estate in trust to pay the interest for life to all the children of his two sisters *Reyne* and *Estrella*: in case of the death of any their issue to have their respective shares; with benefit of survivorship for want of issue; and over, in case the survivor should die without issue. The testator died in 1789, leaving three sisters; *Reyne*, who was never married, but in 1757 changed her religion from the *Jewish* to the *Roman Catholic* persuasion, became a professed nun, and was baptized by the name of *Maria * Hieronyma*, and lived at *Genoa*; *Estrella*, and *Rebecca*, who were married, and lived at *Leghorn*. *Rebecca* had several children, who brought the bill against the trustees claiming upon the ground, that the testator intended *Rebecca*, when he named *Reyne*. In support of it they offered parol evidence of the circumstances; in addition to which one witness swore, that the testator had said, when he made his will, that he meant and was about to provide for the children of his sisters at *Leghorn*. The introduction of parol evidence was opposed by the Defendants.

Testator devised to all the children of his two sisters *A.* and *B.*; *A.* long before date of the will changed from the *Jewish* to the *Roman Catholic* religion, was baptised by a new name, and became a professed nun at *Genoa*. Bill by the children of *C.* a third sister living with *B.* at *Leghorn*,

upon ground of mistake in testator, and evidence of intent to provide for his sisters at *Leghorn*, dismissed.

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Solicitor General and *Mr. Fonblanque*, for Plaintiffs.

This Court will permit a mistake of this kind to be set right by parol evidence: *Bradwin v. Harpur*, Amb. 374, *Parsons v. Parsons* (90), in this Court, 8th February, 1791; testator devised in trust to pay 75*l.* a year to his brother *Edward Parsons* for life, and afterwards among his children. At the date of the will the testator had only one brother, named *Samuel*, who had children. Some years before he had a brother named *Edward*, who was dead (91) at the date of the will; and the testator had been in the habit of calling *Samuel* by the name of *Ned*. Parol evidence of these circumstances was admitted. In this case testator could not mean *Reyne*, who had many years before changed her name for another, which would be her legal name according to *Co. Litt. 3, a*. She never could be married; and it was full as unlikely, that he meant by *Reyne Maria Hieronyma* as *Rebecca*. He meant to provide for a sister having a family. The principle of the Court in *Parsons v. Parsons* was to inquire, what the testator meant, by what he inserted in his will. Suppose the testator had given this interest to *Reyne* herself; she must have made out by parol evidence, that she was the person meant; and if she as Plaintiff would have been obliged to bring evidence, that she was the person meant, because her name was formerly *Reyne*, that evidence would be liable to be rebutted.

Lord CHANCELLOR.

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Suppose *Maria Hieronyma* had changed her mind; and had escaped into this country; and had married, and left children *notwithstanding her vow; and that those children were standing here to contest the point? What must be done in that case?

For Plaintiffs.

I must have insisted, that they could not take; and should have succeeded, if I could have made out, that testator did not mean to give to the children of her, coming over in that manner, and having children notwithstanding her vow. The declarations are, that he meant to provide for the children of his sisters at *Leghorn*.

(90) Anto, 266. See the note, 267.

(91) And his children had other legacies under the will.

Mr. *Lloyd* and Mr. *Finch*, for Defendants.

This is no evidence of such intention in the testator, as has been contended: nor can it be read. By the bequest to all the children of these two sisters any children born at the making of the will, and before his death, would be entitled: and if after making the will *Reyne* had had children, they could not be excluded. Here is a person mentioned, who fully answers the description. The cases cited are not applicable. In *Parsons v. Parsons* there was no such person in existence as the legatee named; that is one case, in which the Court admits evidence. Another is, where there are two persons of the same name and description. Another, where there is a bequest to a person by a wrong name; but there is some addition, which ascertains the person intended. That was the case of *Bradwin v. Harpur*; at the end of which case the reporter observes, that there was a sufficient description independent of what was mistaken; and it went upon that. In *Beaumont v. Fell*, 2 *P. Will.* 142, great stress was laid upon the circumstance, that there was no such person as the person named: here there is a person sufficiently named. This is not a latent ambiguity; but is like the case in this Court, where testator gave to the son and daughter of a person without naming them; and he had several sons and only one daughter; the daughter took the whole; and the Court would not let in parol evidence to shew, which of the sons was intended: *Dowset v. Sweet*, *Amb.* 175. Though that circumstance of refusing parol evidence is not taken notice of in the report, yet from a manuscript note it appears to have been so; and the devise to the sons was void for uncertainty.

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Bradwin v. Harpur establishes this; that parol evidence was let in to shew against express words, that the person intended was not the grand niece of the name of *Anne*, but *Mary*, because the latter happened to be alive, the former dead, at the time of making the will. In *Parsons v. Parsons* no such person as was named existed at the time; so here there is no such person as *Reyne*. In that case the testator had formerly a brother named *Edward*; and there was no evidence to shew, he knew *Edward* was dead; and the facts, that he was dead,
and

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and the other living, were collected *dehors* the will; and in this case as well as in that there is a latent ambiguity.

Lord CHANCELLOR.

Latent ambiguity produced and dissolved by parol; but parol never admitted on patent ambiguity. Bequest to the son and daughter of one, who has several sons: latent ambiguity.

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Name given on profession in a convent is not meant for the rest of the world: but former name continues.
Name of confirmation is the real name.

This is evidence offered to explain a will in this form; "I give to the children of my sister *Reyne*:" and the ambiguity is said to be, that though her name had been *Reyne* so as to answer the description, yet before the date of the will she had by becoming a professed nun acquired the name of *Maria Hieronyma*, which consequently does not answer the description. In both the cases cited for the Plaintiff there were besides the mere fact of the parties being dead, articles of description; and those articles of description were inapplicable; and therefore a doubt arose, whether the whole of that description would suit the person. From the moment that latent ambiguity is produced in the only way, in which it can be produced, namely, by parol evidence, it must be dissolved in the same way; which has always been the governing principle. But there is no case for admitting parol evidence to shew the intention upon a patent ambiguity upon the face of the will (92). It is almost impossible to say, that if there is a bequest to the son and daughter of one, who at the time of the bequest has four sons and a daughter, there is not such a dissonance between the state of the facts and of the bequest as to let in satisfactory evidence, that one son was meant; for it is clear he meant one. It is within all the rules of latent ambiguities; therefore I fancy, the Court in that case of *Dowset v. Sweet* went upon the ground, that the evidence was not sufficient to shew the intention; and then it became uncertain. To decree for the Plaintiffs in this cause would go far beyond any decided case, and would be very * dangerous. First, as to this name: it is well known, that it is part of the profession and separation from the world to give a conventual name. It is the policy of the thing. But I apprehend, that conventual name is not meant for the rest of the world: but the former name continues, and by that they are always spoken of. If the fact was, that a child was confirmed at seven years old by another name, it is the received law of the country, that the name of confirmation is the real name. The testator has expressed

(92) Ante, 259.

expressed himself so largely, that he does not seem to have thought, whether they had children or not; but intended to give to all possible children without adverting to any particular children, or to the circumstance of their having or not having any. He took no notice of the situation of these two sisters at *Leghorn*, nor of that of the other. I am not satisfied, that if he knew, that he had a sister named *Rebecca* at *Leghorn* with a number of children, he meant to provide for her family; for if so, he would have named her by her right name. There is no idea, that he did not know her right name. To decree for the Plaintiff would be very dangerous; therefore I am afraid, I must dismiss the bill. However I will not say so now; but will think of it.

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A few days after the bill was dismissed.

WEYMOUTH v. BOYER.

1792.

Feb. 10th.

Mr. Justice BULLER, for the Lord CHANCELLOR.

BRyant and *Tewkesbury*, merchants in partnership at *Philadelphia*, were indebted to *Weymouth*. *Bryant*, being arrived in *England* for the purpose of disposing of a cargo, *A.* agreed to sell goods to *B.* to be accounted for in part of a debt

to *B.*: *C.* with notice agreed to sell the goods as factor: not allowed to retain for a debt to him from *A.*

Property in a cargo transferred by bill of sale signed by vendor and vendee: but by a new agreement signed by them before they parted, that it shall be sold and accounted for by the factor for vendor, it is reduced to agreement, and therefore remedy in Equity.

Where there may be remedy at Law, yet if doubtful or difficult, Equity will hold jurisdiction. Joint owner not necessary party to bill against factor on a demand against the other moiety, Defendant having kept separate accounts, and admitted the produce of that moiety to be in his possession.

A. stated by books in evidence for Defendant to be a merchant abroad, and one witness swearing he knew him late a merchant abroad, and no evidence of his return, sufficiently proved out of the jurisdiction, as would be

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a cargo, consisting of tobacco, deer skins, and pipe staves, one moiety of which belonged to him and *Tewkesbury*, the other to *Richards, Weymouth* upon the return of a bill unaccepted, which had been drawn in his favour by *Bryant*, pressed him on account of his debt; upon which *Bryant* agreed to sell *Weymouth* 45 hogsheads of the tobacco, to be accounted for by him in part of his demand. Upon the 1st of *July*, 1785, an invoice was mutually signed with a memorandum, that *Weymouth* had bought 45 hogsheads of that tobacco, specified by numbers: but, before they parted, **Weymouth* proposing *Holder* as his factor to sell the tobacco, *Bryant* objected; and it was agreed, that the whole should be sold by *Williams*, factor for *Bryant*; and an agreement for this purpose was accordingly signed by both. On the 4th of *July* a meeting took place at *Bristol*, where the ship had arrived, between *Weymouth, Bryant*, and *Williams*; and an order to the Captain to deliver the tobacco to *Williams* and Co. was signed by both parties. *Weymouth* returned to *Exeter*, the place of his residence; and after some time not having heard from *Williams* wrote to him to inquire about the sale, to which letter no answer was given. *Weymouth* wrote a second letter expressing surprize at not having heard, whether the tobacco had been sold, and what his 45 hogsheads would amount to, or whether they were to wait another sale; desiring also to know the quality, and whether they would sell for 20 or 21 pence. To this letter *Williams* sent an answer, dated the 22d of *July*, acknowledging the receipt of both letters, and saying, that on account of the new act before the House of Commons relating to tobacco he had postponed landing the cargo, in hopes some advantage might be derived from it; that *Bryant* was in *London*, to whom upon his return he would deliver the letter. The cargo was afterwards sold by *Williams*, and produced above 2000*l*. After the sale *Williams* refused to

be presumed at law; and Defendant precluded from objecting that he was not a party.

Defendant examined as a witness; bill dismissed as to him with costs.

Interest refused because not prayed by the bill.

Trover does not lie for one not having the property, nor against one in possession under and making sale by order of the owner, for conversion is the gist of it: and if no conversion at the moment of sale, refusal afterwards will not do.

to account to *Weymouth*, saying, the partnership of *Bryant* and *Tewkesbury* was indebted to his partnership, and that he must take care of himself first; upon which *Weymouth* brought the bill against *Williams* and his partners and *Bryant* for a discovery and account. The bill charged *Tewkesbury* to be out of the kingdom; but that did not appear in proof otherwise than by the books of the Defendant *Williams*, which he produced in evidence, in which *Bryant* and *Tewkesbury* were stated to be merchants at *Philadelphia*. Defendant *Bryant*, whom the Plaintiff had examined as a witness, swore, that he knew *Tewkesbury* late a merchant at *Philadelphia*. *Williams* by his answer admitted, that when the Plaintiff told him, either that he had purchased or had agreed to purchase 45 hogsheads of tobacco from *Bryant*, he might answer "*very well*," as was charged by the bill; but insisted, he had no idea, that the Plaintiff had any interest in this tobacco, and that he conceived the letters to be mere impertinence from a man, who had no business to interfere, and as such did not answer the first; but he admitted, that he wrote the answer to the second as stated.

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Mr. *Mitford* and Mr. *Ainge*, for Plaintiff.

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If *Williams* had a right to retain for the debt due from the partnership of *Bryant* and *Tewkesbury* to his partnership, he ought to have disclosed that in his letter. But that was an after-thought. If he was entitled to retain for any thing, he could only retain for the sum due before this transaction; and it is very immaterial, whether he can or cannot with respect to that sum: but it is impossible for him to retain for any debt accrued after those letters (93). Even supposing he could for the whole sum alleged to be due, there will still be a balance besides the produce of the rest of the cargo.

Solicitor General, Mr. *Mansfield*, and Mr. *Stanley*, for Defendant *Williams*.

Defendant is entitled to retain, unless a legal or equitable title appears in the Plaintiff. One objection to the bill is, that it

(93) The debt, due from *Bryant* and *Tewkesbury* to *Williams* and Co. before the transaction with the Plaintiff, was for the Plaintiff stated at 235*l.* and for the Defendant at 700*l.*

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it is a bill for discovery purely; and if it is a bill for discovery, upon the effect of which discovery Plaintiff can bring an action, he ought to pay for it. Suppose the tobacco had not been sold; upon those facts they had only to bring an action of trover for it. On the other hand supposing it sold, and that Defendant had undertaken to account for the produce, they might have brought an action for money had and received for the produce; and then this is only a bill for discovery; to which a prayer for relief is added, when the only relief, they can have, is a verdict, if they can satisfy a jury, that the Plaintiff had a property either in the tobacco or its produce. Plaintiff had nothing to do but to ask *Williams* the amount of the produce and of his debt, and to bring an action for the surplus. This is upon the principle stated for Plaintiff, that he is at all events entitled to the surplus above the debt to *Williams*. There can be no decree against *Bryant*: for this bill proceeds upon the principle, that the property was transferred by him to *Williams*; which supposes, that *Bryant* has no interest in the question: if he has, then there is a formal objection, that Plaintiff cannot have a decree against a Defendant, whom he has examined as a witness. Another objection to this bill is, that persons are wanting, who must be parties, before the account can be directed; namely, *Richards* and the other partner of *Bryant*; for the account, *Williams* is to yield, must be a joint account to them. *Tewkesbury* is charged to be out of the kingdom: but that is neither proved nor admitted; and even if that is the case, he is a necessary party. There are many instances, that causes must be stopped, if necessary parties cannot be got to appear. A joint owner of this property has such an interest in the account, that they cannot go on without him. So in cases of mortgage, where persons have an interest, causes are often obliged to stand over; and if such parties will not put in their answers, it is unfortunate; but the Court cannot go on, till they will allow their names to be put upon the record. *Richards* is entitled to an undivided moiety of every parcel of tobacco; and is therefore a most important party to contest this point; that *Bryant* had no right to consign to his own particular debt any specific part of this cargo. The only evidence is that of *Bryant*, whose answer and depositions

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sitions are contradictory (94). Besides the depositions of a single witness have never been in this Court the foundation of a decree against the denial of a fact by answer (95). The less the amount of the debt to *Williams* and *Co.* at the time of the transaction with the Plaintiff, the stronger it is for Defendants; for upon that ground it may be argued, that they advanced their money on the credit of this tobacco; but in the other case it might be said, they applied it to their own debt. This is like a suit by residuary legatees or next of kin. All persons interested must be before the Court. At any rate Plaintiff can only have the bill retained for a year with liberty to bring an action. He might have had the common relief of a principal against his broker at law; and if he had wanted a discovery, he might have had that; but the bill would have been short; and he must have paid for it.

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Mr. *Steele*, for Defendant *Bryant*.

The bill must be dismissed as against *Bryant* with costs. That is the invariable rule of the Court, where a Plaintiff examines a Defendant as a witness; and therefore shews, that he was improperly made a party (96).

Reply.

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That rule is laid down with too much latitude. It is this. There cannot be an adverse decree against a party, whom Plaintiff has examined as a witness; but it is the continual practice to examine trustees, &c. as witnesses, and to have a decree against them specifically to do the very thing, they prove is to be done. A man cannot be examined for his own interest or against it, because there cannot be a decree for or against him upon his own evidence. The Plaintiff must pay *Bryant* his costs; but is entitled to have them over against the

(94) This afterwards appeared produced to *Williams*, and the to be a mistake. It was imagined, order to the Captain, which in that *Bryant* in his answer and his depositions he said was delivered to *Williams*.

depositions spoke in contradictory terms concerning a certain (95) Post, *Mortimer v. Orchard*, Vol. II, 243; and the paper; but it turned out, that he references, 244.

was speaking of two different papers, namely, the invoice, which (96) Ante, 294.

in his answer he said was not

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the other Defendants. This is a case, in which the Plaintiff may make his bill either a bill for discovery only or for relief also; and this Court has a concurrent jurisdiction with the Courts of law. *Williams* was factor as to this tobacco. Formerly an action of account lay between a principal and his factor as between merchant and merchant; in which character the factor was liable. But this Court has long assumed jurisdiction on account of the difficulty attending that action. In 1 *Eq. Cas. Ab.* 5, it is said in a note, that by the common law none could be charged in account but as guardian in socage, bailiff, or receiver, except in favour of merchants; for which are cited *Co. Lit.* 172. a. and 11 *Co.* 89, but that though 3 & 4 *Ann.* c. 16, gives an action of account against the executors and administrators of guardian, bailiff, and receiver, and by one joint-tenant or tenant in common against another as bailiff for receiving more than his share, and between their executors and administrators, yet still matters of account are thought more proper for Courts of Equity than of Law. But Courts of Equity have exercised a discretion about this; and have refused to entertain a suit, if the matter could fairly be tried at law. It is a hard case, that a party must pay for his discovery, if the Court of Equity cannot take cognizance of the subject: but Courts of Equity say, where they can, they will make a decision in the matter, and direct an account. There can be no injury to *Richards*; for the Defendants have distinguished in their accounts between him and *Bryant* and *Tewkesbury*; and have themselves divided the funds; and kept separate accounts; and the Plaintiff does not desire an account except upon the footing of their own accounts. The case of residuary legatees does not resemble this. The reason of requiring in that case all persons interested to be before the Court is, that the Court must see all the debts and legacies paid; and *must advertise for that purpose, before they can dispose of the residue. But if there are four residuary legatees, and one is an infant, and the executor has paid the other three, upon a bill by the fourth the Court will pronounce a decree without having the rest before the Court. So in the case of a bill by an infant *cestuy que trust* coming of age it is the constant practice to decree without requiring the other *cestuy que trust*,

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trust, who have received their shares, to be before the Court. They do not pretend, that *Richards's* moiety has not been accounted for. No demand is set up for him. As to *Tewkesbury*; it is admitted that they were merchants at *Philadelphia*; and that *Bryant* came over for this purpose: but it is not suggested, that *Tewkesbury* ever was within the jurisdiction. That is a sufficient admission, that he is not amenable to the Court. They treat him as a person out of the kingdom. It has been determined over and over, that where one of two partners is within the kingdom, and the other is not, the Court will proceed against the one. In the books produced in evidence by the Defendants they are stated to be merchants at *Philadelphia*. *Williams* admits the conversation, in which the Plaintiff spoke of this tobacco in a way, that was very extraordinary for a person, who had nothing to do with it. What else can *Williams's* answer mean, than his assent to the Plaintiff's purchase of that part of the cargo, with which he was then made acquainted? His answer to the letters also, in which he expressly refers to *Bryant*, is decisive. The debt, which the Defendants represent to have been due to them from *Bryant* and *Tewkesbury*, was not in fact due, when this transaction happened; for it is proved, that the goods, in respect of which it was contracted, were not shipped till the 30th of *July*, 1784; and a year's credit is allowed: but the common practice is credit for fourteen months. As to the difference between *Bryant's* answer and his depositions; there is a difference unfortunately between an answer and an examination upon interrogatories. The latter is more likely to be true; as the former is prepared by the solicitor; and was in this instance prepared by the solicitor for the Defendant *Williams*. But there is no important difference between them: for the different accounts suggested to have been given of the same paper appear to relate to different papers. There are two papers charged in the bill. One is the invoice; the other is the order afterwards drawn up to the Captain to deliver to *Williams*. If the Plaintiff is entitled paramount to *Williams*, then he is entitled to the whole produce * of these 45 hogsheads. If *Williams* may set off his demand, the Plaintiff is to have the overplus; and this complication alone would be sufficient to give jurisdiction to equity.

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BULLER, J.

This is a bill for an account of the produce of 45 hogsheads of tobacco; which, the Plaintiff says, the Defendant *Williams* sold, and received the produce for his benefit. There is a great variety of objections; many of which do not go to the merits, but are only objections of form. I must thank Mr. *Mitford* for the observation, he made; that it is not quite fair upon points of form to take advantage of my occasionally sitting in this Court. I believe the Counsel upon either side incapable of doing so: and in justice to the bar I must say, I have repeatedly observed the greatest candour in the practice of their profession, and particularly towards me. A question of this sort is likely to embarrass a person not more experienced in Courts of Equity, than I am. If I err, I can only say, I will take care, as far as is in my power, to err upon that side, on which justice lies; and though I shall give my opinion upon the question as to the want of parties, yet I shall endeavour to obtain information from those best informed, and of the highest authority; and will take care to let the Court know, if that authority differs from me.


The first question is, whether *Richards* ought to have been a party. He is a person, of whom I have heard a great deal at the bar, but no evidence has been read about him; therefore I am at a loss to know, why he should be a party. Another answer is, that the Defendants have separated the funds, and set aside one moiety for *Tewkesbury* and *Bryant*, the other for *Richards*. The only thing as to that, which appears in proof, is the accounts produced by *Williams*, in which he is made a debtor to *Tewkesbury* and *Bryant* for one moiety; and I think, he is precluded by that from making the objection, Suppose for a moment, that *Richards* was more interested, than he appears to be; what is that to the Plaintiff, though it may be to the Defendants? For it is admitted, that no decree in this cause will affect *Richards*. The foundation of the decree is, that the Defendants have admitted so much money to be in their hands for a moiety: and the question is, whether the Plaintiff or *Bryant* and *Tewkesbury* are entitled. Suppose they had admitted too much; it would not affect *Richards*, but would be their own fault. This moiety is as distinct, as if it had been sent over by itself as a distinct cargo.

cargo. As to *Tewkesbury*, I have hesitated much about it; and only now make up my mind, upon what Courts of Law would do upon the evidence of the facts here on the question, whether *Tewkesbury* was abroad or not (97). Is there not that sort of evidence, that must satisfy the mind, that he is? Throughout the suit he is without objection treated as a person resident abroad. But it goes farther; for *Bryant* being examined swears, he knows *Tewkesbury* late a merchant at *Philadelphia*: yet notwithstanding that he might have been within the jurisdiction at the time the bill was filed. But the Defendants state in their own books, that both of them are merchants at *Philadelphia*. In this case I should state it to a jury in this way: "You have evidence, that *Tewkesbury* did "reside at *Philadelphia*; and you have no evidence, that he "left it; will you say upon this evidence, that he still remains "at *Philadelphia*?" There can be no doubt as to the answer. The next objection is, that this bill is only a bill for discovery upon the face of it, and is improper in praying relief; and therefore so much of it ought to be dismissed; and then according to the course of the Court the Plaintiff must pay costs for his discovery obtained. As to the costs; I am aware, that it is the practice of this Court, that if a Plaintiff comes for a discovery, when he has it, he shall pay the costs: but I think the rule so expressed is too general: and if ever a case arises, when I sit here, under circumstances, which I think a proper ground for withholding the costs, I shall put the parties to re-consider the question. By a proper case I mean this; if the Plaintiff is entitled to the discovery, and goes first to the Defendant to ask for the accounts, he has in justice a right to, if the Defendant refuses, and the Plaintiff is thereby compelled to come here for the discovery, I would not give the Defendant costs (98). If on the other hand the Plaintiff thinks fit, to file his bill without trying first to get the discovery in that

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Rule, that Plaintiff in bill of discovery shall pay costs in all cases, is too general: he thought only, where he files a bill in the first instance, not where compelled to it by Defendant's refusal.

(97) On this point Mr. Justice Buller during the argument observed, that the rules of equity are sometimes more strict than rules of law; for that on this evidence a person would in a Court of law be presumed to be abroad.
(98) See *Beames on Costs*, 28, 9. Mr. *Beames* has not found any case, in which this distinction, however just, has been adopted.

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that way, in which men acting with each other ought first to ask their rights, I think, he ought to pay costs. First it is said, trover would lie; but if not, that an action for money had and received would. I am clearly of opinion, trover would not lie upon this evidence. First the Plaintiff upon the whole of this case had not the property; and if he had, the circumstances did not at any period of time warrant trover. Upon that action conversion must be proved; for that is the gist of it. Supposing the Plaintiff's case proved, and laying aside the question whether he had or had not the property, he cannot say, the Defendant wrongfully converted; for according to the Plaintiff's case these goods were left by him in the Defendant's hands to be sold. In selling them the Defendant pursued the Plaintiff's orders; and if there was no conversion at the moment of the sale, no refusal afterwards would do. As to the other action; there is more weight in that. But we must consider it upon the strict rules of law, distinguished from the chances at *Guildhall*. It may be true, that if that action was tried, they would find means to get at the real justice of the case, and to say the Plaintiff should recover, if he proved himself entitled to any thing. But Courts of Law have for years past said, that action is a bill of equity; and that the Plaintiff shall not recover in it, unless he could in equity. That proves the case proper for this Court. Another material ground is, that the Plaintiff with all the inclination, which a Court of Law might have to do justice, would have found it difficult to say, what that justice was; or to enable the Court to say what he should recover. When the bill was filed, no account was given at all; but the Defendant said, he had received the money for his own use, and would take care of himself first. The Plaintiff could not have proved, what the whole cargo sold for; much less the produce of these 45 hogsheads. Then there is something to be allowed to the Defendant for commission. What is that? The Plaintiff does not know what, it is; therefore he must go totally in the dark in an action. If I found it necessary to send him to law, I would not have done it in a qualified way; but would have left him to make out the best case, he could. We have the authority of Lord *Hardwicke*, that if a case was doubtful, or the remedy at law difficult, he would not pronounce against the jurisdiction

jurisdiction of this Court. The same principle has been laid down by Lord *Bathurst*. This brings us to the merits; and upon that it does not seem to me, that there can be any doubt. I think upon the whole, this must be considered as a case, in which the Plaintiff has not the strict legal property, but rests upon an * agreement to be properly enforced here. I found that on observations occurring upon this invoice signed by the Plaintiff and *Bryant*. The intention was, that there should be an actual sale, and that the property really should pass to the Plaintiff; and that is the purport of the memorandum made on the paper, stating that the Plaintiff had bought 45 hogsheads of tobacco specified by numbers; which memorandum was signed by both parties. I should have said, that was a transfer of the property, if it had rested there. That was dated the 1st of *July*, 1785. But it is apparent upon that, that they altered their plan, and came to a new agreement, before they parted, which it was competent to them to do; and the reason was the question, who should be the factor. The Plaintiff had spoken to *Holder*. *Bryant* objected to that, and said, "let them all be sold by *Williams*; and we will account for the 45 hogsheads:" and an agreement was accordingly signed for that purpose. That reduces the case to a case of agreement only in order to let the friend of *Bryant* have the selling of the goods. If it rests upon agreement only, the Plaintiff cannot go elsewhere. Then the question is, from what time the Defendant is bound by this. Three periods are offered; first, the 4th of *July*; the time the Defendant *Williams* was first apprised of this contract between the Plaintiff and *Bryant*: secondly, the 22d of *July*, the date of his letter to the Plaintiff: thirdly, the period, when the account of the sale was wound up; and it was settled, what was due from the Defendants for the money received, and to them for their commission, &c. Upon the whole evidence the period to be adopted is the first; for it is proved, not that it rested merely upon the allegation of the Plaintiff telling *Williams*, he had bought these goods, but that a conversation was held in the presence of the Plaintiff, *Bryant*, and *Williams* the factor. If the buyer and seller are both present, and the buyer says "I have bought," and the seller says nothing, it is conclusive. The answer, *Williams* gave, proves he understood the fact to be true. From

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Vendee says he has bought: vendor is silent: conclusive notice to a third person present.

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that moment he was bound not to controvert the agreement between the Plaintiff and *Bryant*. He admits, he might say, "*very well*." Upon this point *Bryant* is silent. But it turns upon the evidence given by the Defendant *Williams* himself, that this conversation did pass in the presence of *Bryant*; and *Williams* acceded to it by his answer. After some time he in the same month received two letters inquiring after the tobacco; for it appears, that the Plaintiff after receiving that answer* went home, as he well might, satisfied as to his debt, and that he was to receive it out of the produce of the tobacco. The Defendant admits receiving the letter upon the 20th of *July* to inquire, what was become of the Plaintiff's hogsheads. This must have surprised him, according to what he now says. He gave no answer to that, but did answer another letter upon the 22d of *July*; and that answer distinctly admits, that he was to account. He there says, *Bryant* is in *London*, and that he will deliver the letter to him upon his return. With a view of speculation, which he thinks favourable to the Plaintiff, he alleges that as an excuse for the delay. After that I think, the Plaintiff had a right. Some observations were made upon part of the evidence of *Bryant*. The contradiction complained of is not very material to the cause. In his answer he says, he believes, the agreement was not produced to the Defendant *Williams*; in his depositions he says, the Defendant was desired to keep particular accounts, and the order was delivered to him. It seems upon the bill and answer together, that that paper was another; namely, the order signed by both parties to the Captain of the vessel. If there is a contradiction, yet the decree is not founded so much upon the evidence of *Bryant* as upon the answer and conduct of *Williams*. The Plaintiff must have a decree. As to the period, from which the Defendant is to make the account, and be entitled to the allowance. I think it ought to be from the 4th of *July*. If there is any doubt, or a wish to have that reserved, or an inquiry as to how much was due upon the different days, I have no objection to that. Upon the whole I shall decree either with or without that, that the Defendant shall account for the produce of this tobacco with costs to the Plaintiff; and that the Plaintiff shall pay the Defendant *Bryant* his costs, and have them over against *Williams*.

Costs given.

Bill dismissed
with costs as
to one Defendant:
those

costs given over against the others.

Interest was asked; but the demand was resisted, because the Plaintiff had not prayed it by his bill, and upon the ground that there is no case for it upon an unliquidated account.

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BULLER, J.

The last reason given might be an answer: but the other, that it is not prayed, is a better (99).

(99) See *Bruere v. Pemberton*, post, Vol. XII, 386.

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Feb. 11th.

3Bro.C.C.463.

Mr. Justice BULLER, for the Lord CHANCELLOR.

AFTER the death of Colonel *Sharpe*, *Humpage*, who attended him as surgeon and apothecary, obtained a verdict in an action for the amount of his bill against Mr. *Hogarth* and Doctor *Rowley* the executors, who joined in pleading the general issue. Doctor *Rowley* had attended Colonel *Sharpe* as physician. *Isaac*, one of the residuary legatees of *Sharpe*, filed a bill against *Humpage* and *Rowley* for a discovery, and an injunction to stay proceedings at law, on the ground that the verdict was obtained by fraud and collusion between them (100). To this bill *Humpage* put in an answer; *Rowley* did not. After the answer came in affidavits in support of the injunction upon the merits were offered to be read; which was objected to by the Defendant (1).

Injunction bill charging fraud in obtaining verdict: affidavits contradicting the answer read in support of the injunction on the merits.

Mr. *Richards*, for the Defendant *Humpage*.

The answer must be taken to be full, as there is no exception. They now move for an injunction upon the merits, not having any merits disclosed by the answer, which must be considered as true; and they attempt to read affidavits to contradict the answer. There is no instance of permitting affidavits

(100) See *Alsager v. Rowley*, and *Humpage*. From the statement of the affidavits it appeared

(1) One of the affidavits was made by *Hogarth*, the other executor; who was convinced of the fraud between his co-executor to be a case of gross fraud. Doctor *Rowley* had a legacy of 500*l*. *Humpage* had one of 200*l*.

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affidavits to be read in a case like this; but there are many, in which it has been refused. The only case, in which it was strongly alleged, that affidavits might be read in contradiction to the answer, is *Strathmore v. Bowes*, 2 Bro. C. C. 88. There the bill was for an injunction against waste; and the injunction was granted in the usual way upon certificate of the bill filed and affidavit of the facts. The answer denied waste; and upon that answer Lord *Kenyon* then *Master of the Rolls*, and sitting for the *Lord Chancellor*, thought the injunction ought to be dissolved; but Mr. *Mansfield* the next day stated to Lord *Kenyon*, that he had *mis-stated the practice; and that in that single case they had a right to read affidavits. However they were only read by consent. That is the only case, in which it has been urged strongly.

Solicitor General, Mr. *Mitford*, and Mr. *Stanley*, for the Plaintiff; and Mr. *Mansfield*, for *Hogarth*.

In the common case of Plaintiff and Defendant at law, in order to have an injunction, the Defendant at law, who is Plaintiff in equity, must shew out of the answer some ground. If *Rowley* and *Hogarth* had filed a bill for an injunction, they must have found in the answer some ground for staying the proceedings at law. This case proposes to make out to the satisfaction of the Court, that by collusion and fraud between the Plaintiff at law and one of the executors, by giving to the transaction the colour of a legal inquiry they mean to commit this fraud upon the testator's assets; and the case states the trial at law to be one part of the fraud; and then the principle between *bond fide* Plaintiffs and Defendants does not apply. This is more like the case of waste and encroachment upon patents. In 3 *Cox's P. Will.* 255, n. the proceedings upon *Strathmore v. Bowes* are stated thus; that it was directed to stand over to search for precedents for reading affidavits in support of the injunction after answer; that Lord *Kenyon* as well upon the precedents as the reason of the thing thought it proper; but said, it so materially concerned the practice of the Court, that he would not decide the point without consulting the *Lord Chancellor*; and that afterwards they were read by consent. According to this note Lord *Kenyon* thought it proper and reasonable; and then consent, when they could

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no longer refuse, does not signify: for it would have been ordered without consent. There is a case of *Robinson v. Lord Byron* (2), in which I (3) was Counsel for the Plaintiff. He had a mill, to which the water flowed from Lord Byron's park; Lord Byron let down the water upon this mill; upon which the bill was filed to prevent the water from flowing otherwise, than it did before; and upon affidavits an injunction was granted. Upon a patent invention affidavits are read after answer: *Gibbs v. Cole*, 3 P. Will. 255. In this case the Plaintiff at law was trying the question with himself; and by this verdict money is to be paid, which, *if not due to the Plaintiff at law, is due to the Plaintiff in equity; who is to take his chance of a *devastavit* afterwards. It is more analogous to the cases of waste and of *Robinson v. Lord Byron*, than to those alluded to on the other side: they are only the common cases of a bill for injunction after verdict, in which the Court will proceed only upon the answer, and will not try it upon affidavits as to the merits, but will have the cause decided in the regular way by examination of witnesses. That practice is established by those cases. The injunction goes of course; and is dissolved of course, unless some particular circumstances appear from the answer. But those cases do not apply to cases, where the injunction is not obtained of course, but upon affidavits, in which cases affidavits may be read; and the practice does not require the Plaintiff to rest upon equity in the answer. That is the case of waste; and the doubt thrown upon it in *Strathmore v. Bowes* was done away by *Robinson v. Lord Byron* (4). In *Chamberlayne v. Dummer* (5) affidavits after answer were read. In *Charlton v. Poulter* (6) a brewer filed a bill against his partner; who resisted him in attempting to interfere in the business. Upon affidavits an injunction was granted. The Defendant attempted to dissolve the injunction. It came on before Lord Hardwicke; and affidavits and the answer were read;

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(2) 1 Bro. C. C. 588, *Wright v. Howard*, 1 Sim. & Stu. 190, as to the use of the water of a river by the proprietor of land on the banks, injurious to other proprietors.

(3) The Solicitor General.

(4) 1 Bro. C. C. 588.

(5) 1 Bro. C. C. 160.

(6) *Reg. Lib.* 1752, A. fol. 73, 13th June, 1753, stated in a note to *Norway v. Rowe*, post, Vol. XIX, 148.

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read; and upon the whole, though the answer denied the facts, an injunction from obstructing the trade was awarded. This case is out of the common rule, and within those of partnership, waste, &c. It is in fact a bill to obtain a new trial upon the ground, that one person, who was the legal person to defend the action, acted as trustee for the Plaintiff, and has fraudulently defended it; by which fraud the verdict was obtained. That is a case, which can only be made out by affidavits, because the Plaintiff is not a party; for which reason, if no answer was put in, the injunction would only be obtained upon affidavits. *Rowley* has not yet answered. It is impossible, that justice can be done without reading the affidavits. *Hogarth* wishes, the Plaintiff may succeed, thinking there has been no trial yet. Whether *Hogarth* was right or wrong in joining in the plea, it cannot injure the residuary legatee. The case miscarried at law, because *Hogarth* could not be a witness, and Mr. *Erskine* (who was his Counsel) said, the truth must be discovered in a Court of Equity upon the bill of the residuary legatee.

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Reply.

There is nothing to distinguish this. The only case, in which it has been attempted to read affidavits in this way, is the case, I stated, of waste; a case in which irreparable mischief must be done, unless there is an instant interposition to prevent it. But even in that case they have not shewn any instance of reading affidavits in opposition to an answer. There are other cases, which may be compared to waste. Partnership is a case of irreparable waste. But this is the common case. *Hogarth*, it appears, was a submitting party throughout. According to their own shewing here is a sum of money in danger of passing under a verdict from the executors to the creditor, who obtained the verdict. Will not Dr. *Rowley* be liable to a *devastavit*? Are either of them said to be insolvent? If the bill is well founded, and the money does pass, they will put that upon the record; and if collusion is proved, the decree must be for the money to be restored.

BULLER, J.

This objection certainly is not entitled to extraordinary favour; for it is only calculated for delay. If it is true, as
the

the Plaintiff says, that he can make out that case stated by the affidavits, the end must be, that it must be tried again: and whether it is tried in consequence of an issue upon reading the affidavits, or it is deferred till the hearing, makes no difference but in point of time, and the chance of losing witnesses, and perhaps some of the effects, to which he is entitled. However I will not break through the practice of the Court, if this is within it. It is admitted on all hands, that in ordinary cases there can be no injunction till the hearing upon the merits, unless a ground for it appears upon the answer. But it is clear there are exceptions. Waste is one excepted case on account of the mischief, which may take place. It is one of the maxims of this Court to prevent mischief. This case is very analogous to waste; for we must consider, that here the prosecution is against the specific thing. The Plaintiff claims the specific assets; and that makes a great difference between equity and law. At law in many instances they only sue the person in respect of the assets; here the assets themselves. The Plaintiff says this is waste; and it seems to me directly within the principle of waste. Another case, in which it is admitted, that affidavits are * permitted to be read, is upon patents. That is a stronger case; but yet in that case Courts of Equity have done it. So in the case quoted of Lord *Byron*. It was going a great way to say, that until the cause is tried, the Court will prevent the exercise of a right; yet they did so. Where the rights of the parties will remain at the hearing *in statu quo*, when the bill was filed, it is a reason for refusing it. But there is another ground, which is decisive. The Plaintiff proceeds wholly upon the fraud; and there is no instance, in which the Court has refused to go into evidence in that case. Therefore let the affidavits be read. This has nothing to do with the merits; but the Court is bound to go upon the idea, that the Plaintiff will make out the ground of fraud suggested, and if so, the affidavits ought to be read (7).

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In ordinary cases no injunction till hearing, unless a ground for it in the answer: but in cases of waste, patents, and irreparable mischief, it will be granted on affidavits after answer.

At law the person often sued in respect of the assets; in equity the assets themselves.

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(7) The authority of this case *phett v. Jones; Platt v. Button*; has been much questioned. See XIX, 144, 350, 447. *Smythe* post, *Lane v. Williams*, Vol. VI, v. *Smythe*, 1 *Swanst.* 252, and 798; VII, 308. *Hanson v. Gardner*. *Berkeley v. Brymer*, IX, the note, 254. *Jefferys v. Smith*; *Goodman v. Whitcomb*; 1 *Jac. & 355. Norway v. Rowe; Mor-* *Walk.* 298, 589.

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Upon this decision *Humpage* consented to go to a new trial without having the affidavits read. An issue was directed; *Humpage* to be Plaintiff, *Isaac* Defendant.

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March 5th, 6th.

Equity of redemption of a term cannot be taken in execution.

LYSTER v. DOLLAND.

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WILLIAM and *Thomas Lyster* were joint-tenants of leasehold premises under leases containing covenants to build, and reciting, that the houses were then erecting. After having laid out their money jointly in building upon these premises they joined in a mortgage of them to *Dolland*, and also in a bond to him by way of collateral security. The mortgagee filed a bill of foreclosure; and pending that, and while he was in possession by ejectment brought upon his mortgage, he sued upon the bond, and took the mortgaged premises in execution; and upon the 12th of *July*, 1781, they were sold by the sheriff to a trustee for the mortgagee; but it was not suggested, that he purchased them unfairly. The day before the sale *William Lyster* died, having disposed of his interest in the mortgaged premises by will. In 1785 *Thomas Lyster* and the representative of *William* filed a bill to redeem; and upon the death of *Thomas* * a bill of revivor and supplement was filed, upon which the cause came on. The Defendant went into evidence to prove acquiescence by *Thomas* under the execution; and that he expressed himself satisfied and pleased with it, saying he should get rid of a burthen; and that he hoped, the Defendant would not issue any execution against his person; which the Defendant agreed not to do; also, that the Defendant had offered to take the principal, interest, and costs; to which the Plaintiffs answered, that they would pay them upon receiving the account; that the account was made out accordingly; and then the Plaintiffs refused to pay it without making any objections to it. These transactions were subsequent to the time of filing the bill. The cause however did not turn upon the evidence; but was stopped short upon the ground, that the execution was bad.

Mr. *Mitford*, for the Plaintiffs.

One reason, why this sale will not be effectual, is, because the bill

bill of foreclosure was depending at the same time. A mortgagee having a suit depending is not permitted to act under his own bond in fraud of his covenant to permit redemption. Besides the Defendant was in possession at the time by the ejectment brought upon his mortgage; and therefore had the complete interest in this leasehold estate; and all, that remained, was the equity of redemption; which was all, that could be taken in execution. Then he must have sold the estate subject to this mortgage, and will be accountable for all the money received under the sale; for it could not be a good execution, because the property taken belonged to the Plaintiff at law; and then the case is precisely, as if there had been no such execution; and the Plaintiffs are entitled to the redemption, which the Defendant is under covenant to permit. If a mortgagee could do this, it would put an end to all redemption of leasehold estates.

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Mr. Lloyd and Mr. Scafe, for Defendant,

The Court will allow the mortgagee to take every remedy, he can; and if he got judgment upon the bond, he would be entitled to levy upon any of the property of the obligor. When the execution was sued out, *Thomas*, upon whom the whole equity of redemption devolved on the death of *William*, was privy to the whole, and acquiesced entirely, knowing that the equity of redemption had been sold to the Defendant. This * Court will not determine, whether this is such an interest, as could be sold under an execution. It is taken now to be law, that the sheriff may extend equitable interests of this sort. The Defendant might buy it as well as any other person, if fairly; and the bill does not suggest, that it was not fairly bought. It is as good as a release of the equity of redemption. The sheriff's bill of sale is the same as a conveyance of it. Then it was competent to him to say, "here is the account; pay me within such a time; and I will take it: "if not, you shall not redeem:" 2 *Eq. Ca. Ab.* 595. 15 *Vin. Ab.* 468. *Lyster* was obliged to the Defendant for taking this course instead of taking his person; which might have been done, as he was a joint obligor.

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Reply.

As to the acts of *Thomas Lyster*, the leases being building leases

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leases made to *William* and *Thomas* as joint-tenants undoubtedly, yet being in the way of trade, and money laid out by both, the beneficial interest would not survive, though the legal would. Therefore *William's* interest went to his devisees; and *Thomas* had it not in his power to make a release of the equity of redemption to bind them. It is impossible, that any acts of his can have the effect of charging the estate of *William*. The Defendant may revive the judgment, and take out execution against *William's* estate. But the evidence is only, that *Thomas* did not object to the sale; which is not enough to put an end to the Plaintiff's claim. It was merely a conversation between the Defendant's attorney and *Thomas*. There was no instrument: nor does it appear that he was apprised of his right. The mortgagee has done this to defeat his own agreement to a redemption.

*Lord* CHANCELLOR.

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The Defendant's bill depending does not make much difference. Was there ever an instance of such a proceeding as this; of an action brought upon a collateral bond for the value of the mortgage? If the fact is, that the obligee having a pledge in his hands has brought an action against the obligor, and has taken the pledge in execution, he takes only the equity of redemption under the Statute of Frauds; which but for that statute could not be taken in execution. If he had got a foreclosure, \*and had afterwards brought an action, and sold it for 5*l*. he would have opened his foreclosure again. I do not think, he could have sold it to a stranger. If that offer was made, I would give it all weight. What is to become of the principal case and of the case put in that way are two different things. But it is new to me, that this case obtains in mortgages. Under the Statute of Frauds the sheriff may extend an equity; but then the vendee of the equity is in the same case as the Defendant in the action; and must proceed as upon cases in action; and must make it good by the same means as the Defendant must; for it is an extent of a thing in action. In cases of bankruptcy things in action are transferred: and the parties to whom they are transferred, bring the bills and actions. If this is done adversely, he must proceed upon either the bond or the mortgage. Suppose he  
 sold

sold it to a stranger; the debt is diminished by so much as the stranger gave for the equity of redemption. Here the thing extended and sold was the whole term; for the vendee of the sheriff gave the price for the whole, not for the equity only. The Plaintiff submitted to the sheriff's making sale of both; which could not be the object of his *feri facias*: but *non constat*, how much was paid for the equity, and how much for the rest. It is impossible to know, what the Defendant was paid in virtue of his extent. If there was any agreement by *Lyster* in order to avoid a *capias ad satisfaciendum*, that would be a sufficient consideration; and I would consider the case to be wound up in that manner: but if it stands upon the dry point, it appears to me impossible to maintain it. As to the moiety of *William*; they were joint lessees; but brought each their quota of money upon the subject; and by the rules of equity in that case there is no survivorship. Though if two persons take a farm, the lease will survive, yet has it not been determined, that if they lay out money jointly upon it, that turns round the estate at law, and makes it equitable? I allude to the case of a joint lease taken or a fee, purchased to carry on a joint trade: the object being to carry on the trade, the Court thought, it would convert the joint property for the purposes of trade and making a common advantage.

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Mr. *Lloyd*, for Defendant.

I believe, that point was not brought before the Court.

Lord CHANCELLOR.

However I am now clearly of opinion, that if partners purchase leasehold or freehold to carry on trade, that will carry with it all those circumstances (8). If there is any doubt about the facts, I would certainly let them in by way of inquiry; and have it cleared up by the Master. The thing, I want to know, is, how far it is possible for a mortgagee of joint property, so circumstanced as to be in the act and habit of being improved at a joint expence, to proceed against one, and

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If joint-tenants of leasehold or freehold lay out money jointly upon it in the way of trade, there is no survivorship.

(8) 2 *Ves.* 258. *Lake v. Cradock*, 3 *P. Will.* 158. See post, 441. *Crawshaw v. Maule*, 1 *Morley v. Bird*, Vol. III, 628. *Swanst.* 495. IX, 597, the note to *Jackson v.*

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take their joint property in execution. In that case both ought to be sued. The Defendant is going upon the execution of an equity; and if he takes it, it must be subject to all equity, to which it is liable. He got it sold; and in the manner of it has thrown his own estate in; so that the Court cannot know, for what sum the equity sold, and for what the principal. He did that in order to make sale of it. It is not possible for him to make sale of a subject mortgaged under a notion of extending an equity, and put his own legal estate in the same contract, and have it sold by the sheriff, as is said, though the evidence shews, it was by order of the Defendant. If this had been a mortgage in fee, he could only have extended it to hold *quousque*; and then it would have been opened at once. This is of the first impression; and though I admit, an equity may be extended under the Statute of Frauds, and that this Plaintiff as well as any other might cause it to be extended, yet where he throws his own estate in, and makes it impossible for the Court to see, how much was satisfied by the equity of redemption, and how much was for the mortgage, the consequence is, I do not know, how this man is to plead upon a *capias ad satisfaciendum* or revived judgment. I will give my opinion to-morrow.

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Upon looking into the statute I do not think, this is within it (9). The words are, that upon every statute, recognizance, or judgment the sheriff shall deliver in execution to the party any lands, tenements, hereditaments, rectories, rents, or tithes, held in trust for the Defendant, just as if he had been actually seised * or possessed of the same. Here it is impossible, he can be seised. Upon reading the statute I thought, we were all mistaken yesterday. I do not think, the statute touches it at all. I imagined, the words were much larger, and that the words "equitable interests" were contained in it; but found myself wrong. Therefore on consenting to confirm the leases (10) let the Plaintiffs be let in to redeem upon the usual terms; and let there be an inquiry as

(9) *Scott v. Scholey*, 8 *East*, 467.

(10) A particular application was made for that.

as to all the money laid out; and let 4 per cent. interest be computed upon it.

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After this decision, Mr. *Lloyd* mentioned *Plunket v. Penson*, 2 *Atk.* 290, and the case of Sir *Charles Cox's creditors*, 3 *P. Will.* 341, where it was determined, that upon a mortgage of a term for years the equity of redemption is equitable assets (11), because the whole interest is in the mortgagee at law, and nothing therefore in the mortgagor; which last case was followed by Lord *Hardwicke* in *Hartwell v. Chitters*, *Amb.* 308; from which cases Mr. *Lloyd* said, it seemed not to be extendible. He also said, an inquiry had been made at the sheriff's office; and that they take no notice of the legal interest, but sell the whole remainder of the term.

(11) These cases seem now to be over-ruled: see *Sharpe v. Earl of Scarborough*, post, Vol. IV, 538.

KIDNEY v. COUSSMAKER.

WILLIAMS v. COUSSMAKER.

March 6th.

BENJAMIN KIDNEY by his will, after giving directions as to his funeral, and the erection of a monument, gave, devised, and bequeathed, certain estates in the counties of *Northampton, Bedford, Huntingdon, and Leicester*, and in *London*, and all other his messuages, lands, tenements, and hereditaments, in the said several counties of *Northampton, Bedford, Huntingdon, Leicester*, or elsewhere, in *Great Britain*, except the estates hereinafter given to his wife for life, to the use of trustees, their heirs and assigns for ever, upon the trusts after-mentioned, viz.: upon trust to sell and dispose of the produce to such person and persons, and in such manner, as after-mentioned; first, to discharge "all principal money and interest due and owing to any person or persons for and upon any mortgages or incumbrances subsisting upon and particularly affecting the same estates at the time of my decease, as the same estates are thereby severally charged and chargeable; and shall and do place out and invest all the overplus of the money arising by such sale or sales

Devise of land to be sold: money, produced by the sale, charged with simple-contract debts on the intention, though doubtful.

" as

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“ as aforesaid after deducting their charges in the execution of  
 “ the aforesaid trusts in government securities or in any of the  
 “ public funds in their names, &c. in trust for such person and  
 “ persons, in such proportions, and in such manner and form  
 “ in all respects, as I have hereinafter directed of and con-  
 “ cerning the residue of my personal estate; it being my intent  
 “ and meaning, that such overplus money shall go with and be  
 “ considered as part of the residue and surplus of my personal  
 “ estate.” The testator then recited, that under the will of  
 Sir *R. K.* he and *William Nutt* had a sum of 1000*l.* another of  
 700*l.* and another of 500*l.* in trust to be laid out in govern-  
 ment securities, and that the dividends should be paid to three  
 persons respectively for their lives, and that after the decease  
 of each respectively the principal should be considered as part  
 of that testator’s personal estate. Then taking notice, that  
 those sums were not so laid out, but that he had paid interest  
 at 4 *per cent.* to the annuitants in respect of them, he directed  
 his executors, as soon as conveniently could be after his de-  
 cease, to raise out of his personal estate those three sums, and  
 to invest them in government securities for the uses of Sir *R. K.*’s  
 will. The testator then confirmed the settlement made on his  
 marriage with his wife *Elizabeth*; and ratified and confirmed  
 to her all sum and sums of money given or bequeathed by  
 relations or friends, which is, are, or shall be, invested in the  
 public funds, or laid out upon any security in her own name,  
 or in the names or name of him and his wife, or of any person  
 or persons in trust for her. He then gave several messuages to  
 his wife for life, and if they fall short of producing annually  
 400*l.* directed, that “ the deficiency if any shall be made up  
 “ to her out of the interest, dividends, and produce of my  
 “ personal estate; it being my will and meaning, that my wife  
 “ shall always have and be entitled unto an annual income of  
 “ not less than 400*l.* for her life, to be issuing and payable as  
 “ aforesaid:” if the rents, &c. exceed 400*l.*, his wife to be  
 entitled to the full benefit and income thereof. He then made  
 some specific bequests to her and his two daughters; and de-  
 clared, that the provision in his marriage settlement and by his  
 will made for his wife shall be in lieu, bar, and full recompence  
 and satisfaction, of and for all dower or thirds, free-bench or  
 other customary estate whatsoever, which his said wife could  
 claim

claim or be entitled to out of any part of his freehold, copyhold or customary estates; and that unless she shall within three months after his decease release to his executors all her right of dower and thirds, free-bench and customary estate whatsoever, in his freehold, copyhold, and customary estate, all the provisions hereby intended for her shall cease, except the legacy of 200 guineas. He gave the remainder in the freehold part of the messuages, which she had for life, and all other his freehold, copyhold, and customary messuages, lands, &c. not before mentioned and devised, to his two daughters, *Christian* and *Elizabeth*, as tenants in common in tail, with benefit of survivorship, and in default of issue of both to his own right heirs. He then gave the leasehold part of the premises, given to his wife for life, after her decease to his two daughters equally, their executors, &c. for the remainder of the term, he had therein, and, after powers of leasing to his wife and some legacies, gave and bequeathed to the same trustees “ all the rest, residue, and surplus of my personal estate after “ payment of my debts, funeral charges, the expences of prov- “ ing this my will, the expence of a monument, and legacies “ aforesaid, in trust to place out and invest the same in govern- “ ment securities, or in any of the public funds in their names “ in trust, that they and the survivors and survivor of them, “ and the executors and administrators of the survivor, do “ and shall out of the interest, dividends, and produce, of my “ said residuary trust-estate pay to my wife *Elizabeth Kidney* “ yearly and every year during her life such an annual sum “ \* of money as will in addition to the yearly rents and profits “ of the said messuages, &c. in *Lawrence Pountney Hill*, &c. “ make up the sum of 400*l.* clear of taxes,” &c. such annual sum to be paid to her during her life quarterly; “ and upon this “ farther trust to pay out of the interest, dividends, and pro- “ duce of my said residuary estate such yearly sum, or sums “ of money as they shall think proper,” not exceeding 200*l.* *per annum*, one year with another for each; for the maintenance and education of his two daughters until 21; and upon farther trust to transfer and pay all and every part of “ my said “ residuary estate,” subject to his wife’s life interest in that annual payment, to make up the deficiency before mentioned, to his two daughters in moieties at 21 or marriage, if with consent of the wife and trustees, with benefit of survivorship in case

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of the death of either under 21 or unmarried: and, if both die under 21 and unmarried, he directed, that his "said residuary estate" subject to such annual payment or allowance as afore-said to my wife for her life, shall go and be distributed unto and among such person and persons, who will be then entitled to the same according to the statute of distribution of intestate's estates; and declared, that in the mean time and until the messuages, lands, tenements, and hereditaments in the counties of *Northampton, Bedford, Huntingdon, and Leicester*, and in *London*, before mentioned and directed to be sold, shall be sold, the rents and profits of the same estates shall be applied in the first place in discharge of the interest due and to grow due upon the respective mortgages thereof; and that the overplus of such rents and profits shall from time to time be applied for such person and persons and such uses, intents, and purposes, as is herein before mentioned and directed of and concerning "the interest, dividends, and produce of my residuary personal estate."

The testator appointed the trustees, named in his will, to be his executors; giving them the usual powers to change the funds; and directed them to reimburse themselves out of his residuary estate their costs. One of his daughters died under age and unmarried. There were simple-contract debts, beyond what the personal estate could satisfy, to the amount of 14,000*l*. The second bill was filed by the simple-contract creditors, claiming a right under this will to have their debts satisfied out of the overplus of the money arising from the sale of the real estates, after discharging the incumbrances upon them. The first bill was by the surviving daughter, sole heiress and residuary legatee, to have the whole overplus.

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Solicitor General, Mr. Mansfield, Mr. Mitford, and Mr. Hollist, for the Daughter.

Upon the whole of this will the simple-contract debts are not charged upon the overplus of the money arising from the sale of the real estates. The scheme of the will is this; the testator supposing his personal estate to be sufficient for payment of his debts, legacies, funeral charges, expence of a monument and of proving his will, has contemplated the case of

of the existence of a residue, after all those were paid for; which residue was to be upon certain trusts for the various persons named. Though he has directed the sale of the real estates, and the produce to be applied in payment of certain debts, namely, the specific incumbrances upon those estates, he has not given it after payment of debts, legacies, funeral charges, expence of a monument and probate; for this overplus must be subject to all those five charges, if to any of them, and to the interest of legacies and every other thing carrying interest. After deducting the specific incumbrances upon the estates, and the charge of executing the aforesaid trusts, which are merely those of selling the estates, he has directed it to go to such persons, as shall be entitled to the residue of his personal estate. These creditors are not in any sense entitled to that; but the persons entitled to that are those, who are to take it, after what he calls the residue of his personal estate, shall have been formed; namely, the surplus, if there should be any, to be invested in stock. While this fund remains overplus, the only out-goings, as far as he directs the application, are the interest of the specific mortgages; and to apply it to these simple-contract debts would be contrary to the express direction to apply it to those specific debts only. Therefore the overplus so to be laid out must be the overplus, after having paid only the debts affecting the estate specifically. In the very next clause to that, respecting the overplus arising from the real estate, he expressly directs the sums given by the will of Sir *R. K.* to come out of his personal estate, conceiving that an ample fund for discharging his debts. These words "all the rest, residue, and surplus of my personal estate after paying debts, &c." are part of the description of the thing given, not a charge upon it. If so, then the prior words, directing the overplus of the produce of his real estates to be applied to the same trusts as after directed concerning the residue of his personal estate, do not operate so as to charge that overplus *with his debts and legacies; though if it had been "all the rest of my personal estate *subject* to my debts, &c." that might have made a difference.

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"After pay-
"ing debts"
amounts to a
charge for
debts, for
which very
little is suffi-
cient; the
Court leaning
that way.

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If he had given *Black-acre* after paying debts, that would subject it to debts; for which a very little is sufficient. The Court has leaned that way, if we may be allowed to say so (12).

For the Daughter.

He directs the overplus of both estates to be laid out in government securities, and then calls them both together residuary trust estate; which shews, he had then raised a new idea, viz. an accumulated fund composed of the produce of his real estate after discharging the incumbrances upon it, and of his personal after paying debts, &c. and then he proceeds to declare the trusts of them jointly. Then he has directed the overplus of the rents and profits previous to the sale beyond the interest of the respective mortgages to go, not for the purposes to which his personal was to be applied, but to such persons and uses, as he had before directed concerning the produce of his residuary personal estate; viz. subject to the charge in aid of the wife's income, and for maintenance and education to be divided between his daughters at 21. The only argument in favour of charging the overplus of the produce of the real with the legacies, with which it must be charged if with these debts, arises from the direction to make good the deficiency of the wife's income both out of the interest of his personal and of his residuary trust estate. That is not in nature of a legacy, but of an annuity. With regard to the other legacies there is no such charge as to the residuary estate. Upon the whole he has manifested a plain idea, that his personal would not only pay every thing of this kind, but also leave a surplus; and the words are not sufficient to charge the legacies, debts, &c. on the overplus of the produce of the real.

Mr. *Hardinge* and Mr. *Abbot*, for the creditors.

These creditors are left unpaid in the sum of 14,000*l*. That the Court will go to the utmost in order to pay honest creditors is

(12) Upon the distinction post, Vol. II, 328, *Kightley* v., as to legacies under an implied *Kightley*. III, 551, *Williams* v. charge from general words as *Chitty*; *Shallcross* v. *Finden*, 738. against specific devisees, see V, 362, *Keeling* v. *Brown*.

is an observation very familiar in cases of this kind. A clear intention in this testator some way or other to pay his creditors is admitted. He bequeathed his personal sufficiently for that: but the question is, whether he has made a provision for the possible failure of that primary fund; or if not, whether he has made a provision, out of which that obligation results. The overplus money, before it becomes stock but after taking out the specific incumbrances, is to be considered as part of the personal estate. It is to lose every description of real, and would be liable to debts without an express provision. When it becomes stock, he directs the stock to go as the residue of his personal. There are three kinds of residue: one after a provision for debts: another after a provision for legacies only; a third after a provision for both. The first residue, which he calls residue and surplus, is, after he has made a provision for legacies alone, conceiving that he has directed it to pay debts in the first place. It is impossible to distinguish the words "*after*" and "*subject*." *Batson v. Lindegreen*, 2 Bro. C. C. 94, has decided that. "*After*" was there said to be an adverb of time; but your *Lordship* held otherwise; and said, it was the same as "*subject*," and held the property to be equitable assets. After debts paid this fund acquires a new term, viz. "residuary estate;" for then it goes for the purposes of the trust attaching upon these monies when made stock. It is clear, that when he mentions the term "residue of his personal" he attracts to that description the overplus of the produce of the real. It is the same, as if he had used the words; and if he had said both residue and overplus, there could be no doubt. He then asserts emphatically, that the aggregate fund shall be liable to debts, on purpose least this overplus should escape from that obligation. With the same anxiety he mentions legacies; as to which this fund must be charged with all those articles, if with any. It means to protect the legatees and the residuary legatees by an additional fund applicable to the payment of debts. By the clause to make up the deficiency of the wife's income it is first to be made good out of the personal estate, then out of this residuary aggregate fund, if the personal fails. There is another argument for the creditors. The testator intended, that the legacies, he first named, should

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should be paid first; then the debts; then, and not till then, the residuary legatees. If the residuary legatee succeeds, she will have an advantage over those legatees first named; the advantage of this fund clear from the debts; and the others will lose the benefit of their legacies. He may be thought to be providing for a possible failure \*of the primary fund. There is one passage, which does appear to have some colour against the creditors; viz. the direction, that the rents and profits accruing before the sale shall after certain deductions go in the same manner as the income of his residuary personal estate. He means by that, that it shall go in aid of the wife's income. But even admitting that he has here used imperative words, and that though ever so absurd, they cannot be got rid of, he has done the same thing as to that part, which favours the creditors. The words "after payment of debts," if they apply to the personal only, are nugatory, for the law would have done that; but if to this overplus, they have a force. These estates would have come to his daughter by descent without any direction; but the direction to sell them to pay debts gives it a meaning. *Cloudesley v. Pelham*, 1 *Vern*, 411, shews, that in these cases the Court leans to charge the land. In 2 *Ves*. 272, Lord *Hardwicke* says, that such construction is to be made of wills, as tends to do justice to creditors, and to attain satisfaction of just debts as far as possible; and for that all wills especially in this Court have received a most liberal construction. The presumption always is, that the testator intended debts to be paid. Therefore this overplus is subject to the debts; for the descent is broken; and it is equitable assets.

#### Reply.

The leaning of the Court in favour of creditors must not be carried so far as to be extended to cases of mere conjecture. These creditors did not contract for any charge on the real estate; and therefore have only themselves to blame. The scheme of the will is this; he had real, which he chose to have sold; he had also personal; and it is admitted, that he thought the personal sufficient. He meant this only; to bring together what he calls the overplus of the real, and to add that to the overplus of the personal

sonal to form, what he calls, a residuary trust estate; intending that the overplus of the real should be that money arising from the real remaining after payment of those specific debts, and that the overplus of the personal should be that, which it would have been, if he had used none of those words, upon which the argument on the other side proceeds, namely, "after payment of debts, funeral charges, &c." to which personal property, as such, is liable. This surplus is to be added to the other; and then certain trusts are to attach upon the two \* together. Suppose the executors had renounced the probate, but accepted the trust; they are to sell the real to pay the specific debts and interest. Till the real should be sold, it is admitted, the rents and profits could not be applied to any thing but the interest of the mortgages; after which the surplus was to be paid to such persons, as were entitled to the interest, dividends, and produce of his residuary personal estate. Those words can only mean the persons entitled to it when made a fund to produce interest, dividends, and produce. They are driven to admit, that it is not charged till laid out. The personal is in trust for no one till absolutely cleared of debts. The surplus of it therefore is not subject to debts; and the other overplus is to be in trust for the same persons as the surplus of the personal. They are to pay all other debts, legacies, funeral expences, expence of monument and probate, which testators are not very apt to charge upon real. Those three sums under the other will are not legacies but debts; and he expressly says, they are to be paid out of his personal. As to the declaration in the trust of the residue of the personal respecting the annual payment to the wife, that could not be cleared, till it was entirely gone, because it was an annuity for her life. He provided for that there, but for no other legacy whatsoever. Upon the whole will the words "residuary trust estate" can at most mean the overplus arising from the sale of the land after paying a particular class of debts, and the surplus of the personal after paying another class of debts and all the legacies. If his meaning was, that the debts should come out of this overplus, why did he not direct it so at once? If this demand prevails, it will not be construing the will but making it.

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The leaning of the Court to charge land with simple-contract debts must be warranted by the intention.

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Where testator combines real estate with personal generally, the real is subject to all the burthens of the personal.

I will not call this a case clear of doubt. It must go upon the circumstances of the will, regulated by the intention of the testator, as it appears in the will. The leaning of the Court to make him do justice must have bounds; that is, it must be extracted from the terms of the will, and not imposed by the Court. The only question resulting is this; whether the testator by those words used with regard to the overplus of his real estates after payment of the incumbrances upon them, which he has cleared only to make them amenable to the uses of his will, intended merely that overplus to be divided between his daughters, subject only to the payments for their maintenance, \*and for making good the annuity to his wife, or whether he has used this voluminous phrase, by which he has combined it with the surplus of his personal estate, for any other purpose. If it was a clear purpose in his mind to give as much of these real estates, as he could, to his daughters, burthened only with the annuity to the wife, the natural order of forming the will would have been the first, I have mentioned. Those words would have been the natural manner of doing it: therefore some reason must be found, why in the manner of disposing of that overplus he has so combined it. I did imagine, there had been cases more in point than the common case, where a testator combines real estate with personal generally. If that was the case, there is no doubt, that all the burthens of the personal estate would have been put upon this, so combined with it (13). There are many cases for that. The only question is, whether he has put the surplus arising from the real estate distinctly in the situation of the surplus and residue of the personal after discharging all manner of incumbrances, naturally falling upon it; or intended to place it in that situation, where the literal construction will place it, if attention is paid to the word "*residue*" in the manner, in which he has used it both as to the real and personal estate. The only material words are first as to the gift of his real estate; by which it is true, he has in the result and end provided for particular debts, but not with a view of paying debts of any sort

(13) Not, where real estate is to be converted into personal for special purposes, *Gibbs v. Ougier*, post, Vol. XII, 413.



sort or kind, but with a view of rendering his estate saleable and the produce forthcoming; for he has charged it with those debts subsisting upon and affecting such estates as are respectively charged and chargeable; so in the manner of making that provision he has shewn, his object was not to pay debts under a notion of discharging the obligation, but to provide, in what manner the true value of the estate to be brought forward should be ascertained. He therefore directs it to be sold, and those incumbrances actually affecting it to be paid, in order to render a balance. It was supposed, that if he had charged this with debts at all, it would not have been charged until laid out, or at least that it would not according to his intention: for I admit it may be fairly argued, what he intended, though the words were unnecessary by the operation of law upon it: but that is a difficult argument to raise on either side, (for it was raised on both in some degree); as these words would have been applicable to all the purposes expressed, whether he used the words "laid out in the mean time" or not: viz. "in such proportions, manner, and form in all respects, as after directed concerning the residue of my personal estate; it being my intent, that such overplus should go with and be considered as part of the residue and surplus of my personal estate." The question, arising upon those words, is, what was in his contemplation, when he spoke of the residue and surplus of his personal estate; for I agree, that what it was in his contemplation to do with that, which he called the residue of his personal estate, that it was in his contemplation to do with the overplus, to be considered as part of the residue and surplus of that personal estate. The words used are, in effect, "for such uses and in all respects as that residue." The first question upon that would be, whether the residue of the real estate, (by the residue I mean that sum remaining after the specific incumbrances paid) being thrown into the same fund, is not to be formed by virtue of this clause in the same manner as the residue of the personal estate; if so, then it is clear, that the particular legacies, he gave in the beginning of the will as to the personal estate, will be to be deducted, in order to form a residue of both. The next question is, what is the meaning of the gift of the personal estate. He begins that with certain

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KIDNEY

v.

COUSSMAKER.

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v.

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Intent may be argued from, though the words, by which it appears, were unnecessary.

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tain pecuniary legacies, and a contingent annuity, to make good the income intended for his wife; and then disposes of all the rest, residue, and surplus of his personal estate. Those words in that context are the same as he uses before in the declaration as to the overplus of the real estate directed to go as the residue and surplus of the personal. When therefore he has made them one fund, after providing for that particular charge, he proceeds to dispose of both undoubtedly; that is, having first said, it shall be considered as the residue of the personal estate, he gives it to his trustees and executors, thus: "all the rest, residue, and surplus of my personal estate "after payment of my debts" not in terms before provided for, "funeral charges, expences of probate, a monument, and legacies aforesaid." The question arising upon that was properly stated thus; whether this gift means purely a description of the fund, he was to give, containing the charges only as part of the description, or a created charge, by which he intended to give the whole, in which he has directly included the surplus of the produce of the real, expressly burthened with those charges. First as to the monument; or if they were more favourable charges, which the Court would more desire to execute, if they can be said to have any desire upon the subject, inserted here: could it be contended, that * after declaring the surplus of the real estate to be in the same condition as the surplus of the personal, both should not be charged alike? That could not be so contended after the number of cases, which would have been cited, if the funds had been more blended in this will, than they are. Therefore I think here, all the charges operated and were introduced by the word "*after*." It is too fine here to say, that, because the personal estate is naturally to be charged, the words, by which he has charged, are to be thrown out. It is then said, suppose the executors had renounced. Suppose they had taken only as executors, and had renounced; that would not have made any difference in the construction of the will; for the intent of the testator is not varied. It would have been just as if they had not renounced; and, taking possession, they must have held to the same uses.

The last clause inserted is, where he provides for another accident. It was foreseen, that there might be an accruer of rents

rents and profits, before the estates directed to be sold were sold. It was unnecessary for him to have said any thing as to that by his will, if that argument is to weigh much; for the law would have said, they must have gone like the rest of the surplus. He has said directly, what the law would; namely, that they should go to the fund by way of accession to it to the same persons and uses, and in the same proportions, as the interest, dividends, and produce of his residuary personal estate before given. If any thing turned upon it, I should think, the word "produce" was not to be construed in its extensive sense as a produce by sale, but as a produce by annual profits. Whether if the testator had been asked, what he meant, he would or would not have said he meant to give the whole to the children clear of debts, &c. and have directed accordingly, is more than I know. If it was open to conjecture, there is great room to suspect, he would have given the surplus to his two daughters directly. But the ground, I go upon, is this; that the words "residue and surplus" of the personal estate, mentioned in the first clause, with which he has combined this overplus, must mean the same thing as the words "rest, residue, and surplus" of the personal estate in that clause, where it is directed to be disposed of and subjected to certain burthens, of which the debts and legacies make part. Upon the whole therefore this overplus must be deemed subject to these charges. Let that decree be made in both causes. What was ordered to be sold is equitable * assets; but what has descended, or was devised without any charge for debts, is real. Let the costs of all parties come out of the fund (14).

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[*447]
Costs of all
parties out of
the fund.

(14) Post, *Williams v. Chitty*, *borough*, C. post, Vol. II, 267; *Shallcross v. Finden*, Vol. III, and upon appeal to the House of 545, 738. *Powell v. Robins*, Lords in 1797. Other questions *Bailey v. Ekins*, VII, 209, 319. in these causes are reported, *Shiphard v. Lutwidge*, VIII, 26. Vol. XII, 136; and as to the *Sanderson v. Wharton*, 8 Price, exoneration of the personal es- 680. *Clifford v. Lewis*, 6 Madd. tate, see *Gray v. Minnethorpe*, 33. This decree was affirmed on III, 103, and the note in p. 106. a rehearing before Lord Lough-

1792.

March 12th.

After plea set down, order obtained of course by Plaintiff to amend the bill, and served on Defendant: Plaintiff not appearing, when the plea came on to be argued, it was allowed of course with costs.

JENNINGS v. PEARCE.

AFTER a plea had been set down for argument the Plaintiff upon motion of course obtained an order to amend. When the plea came on to be argued, Mr. *Alexander*, for the Defendant said, that as the Plaintiff declined to argue it, he had only to pray, that it might be allowed with costs.

Mr. *Hollist*, for the Plaintiff stated the fact, that the order to amend was obtained and served upon the Defendant; and contended, that the Plaintiff was entitled to amend on payment of 20 shillings costs only.

Lord CHANCELLOR

Asked Mr. *Mitford* as to the practice in case of a plea or demurrer set down, where the Court has made an order to amend, whether that will dispose of the plea or demurrer.

Mr. *Mitford*.

When a plea or demurrer is put in, and the Plaintiff will amend, upon allegation that it is not set down to be argued, he prays to amend upon payment of 20 shillings costs: but if it is set down, he cannot without full costs. So upon submission to exceptions after an answer is referred, the same costs are paid, as if the exceptions were allowed.

Lord CHANCELLOR.

The question is, whether the circumstance, that the Court has granted an order to amend, does without more strike off the plea. The consequence is, that the order was obtained either on a right or a wrong suggestion; and then the question is, whether the suggestion, that the Defendant has not answered, is a true suggestion, when he has pleaded. Does that liberty to amend *dispose of the plea in any way, and leave the costs upon the Defendant, or is he at liberty notwithstanding that to go on and argue the plea and get the costs? If not, I should advise him to set aside that order for irregularity; and I would make the party, who had been guilty of the irregularity, pay the costs of all, that had been done, as well as of the motion. I have nothing before me but the plea; therefore I think, the proper order for me to make is to allow the

the plea with the common costs. But if upon looking into the practice it turns out to be the rule, that the order obtained to amend does strike the plea off the record, it must be so; but I have great doubts about that. If the date of the order to amend the bill appears upon the record, and the plea is allowed to this time, I think, the amended bill is struck out of Court by allowing the plea, supposing the plea to stand; for the amended bill will be prior to the allowance of the plea; and then will not the posterior allowance of the plea apply to it? It would be otherwise, if the date of filing the amended bill was posterior to the plea, for then the plea upon the record would not apply to it. The terms of the motion of course after plea or demurrer put in for amending on payment of 20 shillings costs are upon stating, that the plea or demurrer is not set down (15). But let the practice be inquired into; for one way or other the Plaintiff shall certainly pay all the costs. There is an irregularity somewhere; and wherever it is, the costs shall fall.

1792:
JENNINGS
v.
PEARCE.
Amended bill is out of Court by allowance of plea posterior to the date of the bill, otherwise if prior.
Motion of course after plea or demurrer to amend the bill on twenty shillings costs must state, that the plea or demurrer is not set down.

Mr. *Hollist* then acknowledged, that he did not appear for the Plaintiff; but only stated the facts as within his own knowledge.

Lord CHANCELLOR.

If the Plaintiff does not appear, the order for allowing the plea is of course; and he may dispose of it as he pleases.

The plea was allowed (16).

(15) *Vernon v. Cue*, 1 *Dick.* 358. (16) *Hinde's Chan. Prac.* 225. 1 *Harr. Chan. Prac.* 271.

CRESSET v. MITTON.

THE bill was to perpetuate the testimony of witnesses to a right of common and of way. The Plaintiffs claimed as lessees of a manor under the Bishop of *Winchester*; and the bill mon and way, because charged so generally, that Defendant could not know the point to be examined to.

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1792.
March 12th.
3 *Bro. C. C.* 481.
Demurrer allowed to bill to perpetuate testimony to a right of com-

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 CRESSET  
 v.  
 MITTON.

bill charged, that the "tenants, owners, and occupiers of the  
 "said lands, messuages, tenements, and hereditaments in  
 "right thereof or otherwise, have had from the time, whereof  
 "the memory of man is not to the contrary, have and of right  
 "ought to have common of pasture for their horses, sheep,  
 "and other cattle in a certain waste called *Brown Clee*  
 "*Hill, &c.*" There was a similar charge of a right of way  
 described for themselves, their horses, sheep, and other cattle,  
 to and from the same over certain inclosed lands belonging to  
 the Defendant. The bill also charged, that the Plaintiffs  
 were in quiet possession; but that the Defendant threatened  
 them with actions, when their witnesses should be dead.  
 There was a demurrer to the whole bill for four causes: first,  
 that the Plaintiffs had no equity: secondly, that no legal right  
 of common was stated in any one: thirdly, that several Plain-  
 tiffs having distinct rights were joined in the same bill:  
 fourthly, that it was not stated as to what messuages in parti-  
 cular, the rights of common and of way were claimed.

Mr. *Lloyd*, for the Plaintiffs.

As to the first cause of demurrer the distinction is settled,  
 that the Court will not permit any bill for this purpose if the  
 Plaintiffs can try their right at law: but where they cannot,  
 they have no other course than by bill. That point was de-  
 termined in the *Duke of Dorset v. Serjeant Girdler*, P. C. 531,  
 recognized in later cases. There a demurrer, because the  
 Plaintiff had not verified his title at law, was over-ruled upon  
 that distinction. That has drawn the line, and established  
 that the bill is proper, where no action can be brought, and  
 the person threatening will not take the proper course to try  
 it at law. These parties are in quiet possession, and are only  
 threatened.

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Lord CHANCELLOR.

What was done in the case of *Webley v. the Duke of Rut-  
 land*, which came before Lord *Bathurst*, and went to the  
 House of Lords?

For the Plaintiffs.

That was a bill for relief. As to second cause, the Plaintiffs  
 have

have shewn a sufficient right to enable them to examine their witnesses: the *Mayor of York v. Pilkington*, 1 *Atk.* 282. There the Plaintiffs stated only, that they claimed a sole right of fishery. There are several rights of fishery; but it was not thought necessary to state, whether it was a separate fishery, a free fishery, or common of fishery, but only that it was a sole right of fishing. It is not necessary to state it with the strictness of special pleading.

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CRESSET  
v.  
MITTON.

*Lord* CHANCELLOR.

Do you say that this right of common is appendant or appurtenant to the premises? That, I suppose, is, what is intended to be proved. But by the words "*or otherwise*" do you mean, that you are at liberty to prove any right? Special pleading depends upon the good sense of the thing; and so does pleading here; and though pleadings in this Court run into a great deal of unnecessary *verbiage*, yet there must be something substantial: the party must claim something. Ought not the Defendant to know, to what you mean to point your commission? He may examine, if he pleases, and cannot without that. If you want to perpetuate testimony to any given right, it is capable of description. At present I do not see, what there is to prevent you from going into the widest examination, that can be imagined.

Allow the demurrer (17).

(17) *Knight v. Knight*, 4 *Madd.* 1.

TEW *v.* EARL OF WINTERTON.  
FORSTER *v.* FORSTER.

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1792.  
*March 16th.*  
*3Bro.C.C489.*  
Interest of  
arrears of an-  
nuity in bar of  
dower refused.

A WIDOW was entitled to an annuity, secured by, bond in bar of dower. The condition of the bond was to convey sufficient freehold or copyhold estates, in trust to raise and pay to her during her life, in case she should survive her husband, a clear annuity of 600*l.* in full satisfaction and bar of dower, &c. By the decree the arrears were to be made good to her out of the personal estate; and in aid of that the real estate was charged; as it would have been liable to dower.

On

1792.

Tew

v.

Earl of

WINTERTON.

FORSTER

v.

FORSTER.

On farther directions one question, whether she could have interest for the arrears; which, having accrued due for several years, amounted to near 7000*l*.

*Mr. Mansfield* and *Mr. Lloyd*, for the widow.

The Court will give interest, where it is, as the books call it, the bread of a wife or child. This is as strong a case as any; for it is her sole interest; and she was really a purchaser for valuable consideration, the husband upon giving this bond having got possession of all her fortune. *Ferrers v. Ferrers*, *For.* 2. *Draper's Company v. Davis*, 2 *Atk.* 211. *Newman v. Auling*, 3 *Atk.* 579. 2 *Ves.* 661. *Batten v. Earnley*, 2 *P. Will.* 163.

*Solicitor General* and *Mr. Mitford*, *contra*.

The cases, mentioned in the books as cases, in which the Court would give interest, as where the wife borrows money, &c. are not a sufficient ground for it. In *Lindsey v. ———*, before the Lords Commissioners in 1793 it was refused; though it was a very hard case; in which *Mr. Beckford* by means of his large fortune held her out a long time.

*Lord Chancellor*.

For interest of arrears of annuity in bar of dower some inference of a contract for interest upon forbearance is necessary: compassion, poverty, or that she borrowed money, not sufficient.

If I am inclined to give interest, I must look into those cases to see, what I can say to the suitors of the Court and to the world as a ground for doing it. I have formerly thought of those cases; and it appeared to me, that the Court never regularly proceeded upon an allowance of interest, except where some transaction or conversation passed between the parties, from which a species of contract, that there should be interest upon the forbearance, could be inferred (18). Poverty, compassion, &c. have been the reasons, which have influenced the Court, according to the printed cases; which

(18) It has been since determined, that a note payable on demand, or on a day certain, will in equity carry interest from the day or demand; as it is given in damages at law: *Parker v. Hutchinson*, Vol. III, 133. *Upton v. Lord Ferrers*, V, 801. *Lowndes v. Collins*, XVII, 27. Not in bankruptcy, *Ex parte Koch*, 1 *Ves. & Bea.* 342, see the notes: but by stat. 6 *Geo. IV.* c. 16. s. 57, interest may be proved in bankruptcy on all bills and notes.



which are so indistinct, that I cannot decide upon those principles. I should be very sorry to give, as my reason for doing it, that she was in distress, or had borrowed money, &c. But I think, I cannot now enter into this point, after the Court has determined, that she should have this made up to her by computing the arrears and paying them from the personal estate, and has charged the real estate in aid of that by a very subtle equity, because if she had not made a contract of forbearance of dower, the entailed estate would have been liable to her dower. The cases, where the Court has given interest, are, where trustees or executors are bound by their duty and trust to make payments regularly, and have kept money in their hands. There the Court has upon farther directions given interest (19).

1792.  
Tew  
v.  
Earl of  
WINTERTON.  
FORSTER  
v.  
FORSTER.

Interest given  
against trus-  
tees and exe-  
cutors keeping  
money in their  
hands in  
breach of  
trust.

(19) *Post, Creuze v. Hunter*, III, 557. *Mackworth v. Thomas*, Vol. II, 157. 4 *Bro. C. C.* 157. V, 329; VI, 79, 92. *Clarke v.* 316. *O'Donel v. Browne*, 1 *Ball. Seton*, VI, 411. *Clarke v. Lord & Beat.* 262. *The King v. Mainwaring*, 2 *Price*, 67. Another point in this case, reported by Mr. *Browne*, was, that interest cannot be computed beyond the penalty of a bond. See post, *Sharpe v. Earl of Scarborough*, and post, Vol. IV, 606, for another point decided in this case.

THOMAS v. DAWKIN.

**A**N exception was taken to a Report, appointing a receiver, for that the Master had appointed *A.*, when he ought to have appointed *B.*

*Lord CHANCELLOR* doubted, whether a Report, which does not require confirmation, can be excepted to.

*Mr. Lloyd*, for the exception, cited *Creuze v. Hunter*, 2 *Bro. C. C.* 253. . 2 *Dick.* 687, as an authority for that.

*Mr. Mitford*, for the Report.

The appointment of a proper person is left to the discre-  
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1792.  
April 20th.  
3 *Bro. C. C.* 508.  
Appointment  
of receiver is  
in the discre-  
tion of the  
Master, who  
need not state  
his reasons.  
To support  
an exception  
there must be  
a substantial  
objection.

1792.

THOMAS  
v.  
DAWKIN.

tion of the Master; and the rule which was recognised in *Creuze v. Hunter*, is, that some substantial objection to his appointment must be made out.

Lord CHANCELLOR.

[ \*453 ]

I agree entirely in that principle. There must be some substantial objection to induce the Court to overturn the appointment \* of the Master. Both these gentlemen are as to character, &c. perfectly equal. The report is properly short. It would not have been right in the Master to have stated all the detail of the reasons, which induced him to make this appointment. Questions are not to be brought before the Court in this way, merely to try which way the stick will fall, and for the chance that another Judge may by accident be of another opinion. Every report may be objected to in the same way. Therefore over-rule the exception. I do not like Exceptions to these Reports (20).

(20) *Post, Garland v. Garland*, Vol. II, 137. *Bowersbank v. Colasseau. Anon. Wilkins v. Williams*, III, 164, 515, 588. *Tharpe v. Tharpe*, XII, 317. *Wynne v. Lord Newborough*, XV, 283. *Attorney General v. Day*, 2 Madd. 246. It is there stated, 253, that the circumstance of the receiver being proposed by the party appears in this report; not, according to the fact, in Mr. Brown's. A Peer cannot be a receiver: *Attorney General v. Gee*, 2 Vex. & Bea. 208: nor the next friend of an infant Plaintiff: nor the Receiver General of a county: *Stone v. Wishart*, 2 Madd. 64, 254.

1792.

April 25th.

Biddings are opened for benefit of the suitor and estate, not of the purchaser, as where he was too late, and the overbidding is small.

ANONYMOUS.

MOTION to open a bidding of 5020*l.* upon the ground of mistake as to the time of sale, and an overbidding of 150*l.*

Lord CHANCELLOR refused it; saying he would not open it for a less overbidding than 500*l.* and that the circumstance, that the bidder was too late, is no ground at all; for the Court gives its assistance to open biddings for the benefit of the suitor and the estate, not of the purchaser (21).

(21) *Watson v. Birch*, post, Vol. II. 51; and the note in p. 55.

BROMFIELD, *Ex parte*.

1792.

April 28th.

3Bro.C.C.310.

**T**IMBER, growing on the estate of a lunatic, was cut under an order of the Court, founded on the Master's report, that it would be for the benefit of the lunatic; and was sold, and the produce was paid into the bank on account of the lunatic: but there was no direction as to the future application. After the death of the lunatic the heir at law petitioned for the money; and was resisted by the next of kin.

Timber on estate of lunatic cut under order of Court, sold, and produce paid into the bank on account of the lunatic: after

Mr. *Mansfield*, for the Heir.

In *Mason v. Mason*, cited in *Tullit v. Tullit*, *Amb.* 371, the point was expressly decided, that the right to the money arising from the sale of the timber remained in the heir, just as if it continued timber. The case has been examined; and is rightly stated there. So in *Tullit v. Tullit*; in which it was cut without an order by the Court.

[ 454 ] his death

on petition by his heir for the money *Lord Chancellor* was

of opinion,

that the Court

may do it for

lunatic's bene-

fit, but only on

pressing occa-

sions; that

when property

is converted,

equity will re-

cal it for the

representative,

if done by

breach of trust,

not if by ac-

cident, the

Court, or the

tort of a

stranger; but

on account of

its conse-

quence and

difficulty of re-

versing order

made on peti-

tion, refused

to give it to

either repre-

sentative with-

out a bill.

*Lord* CHANCELLOR.

In that case, I am told, the accumulation of the money also, as well as the principal, was ordered to be considered as the real estate.

For the Heir.

That does not appear in the report. In the case of the *Marquis of Anandale*, 2 *Ves.* 381, *Lord Hardwicke* considered it as a settled point, that the timber should be considered as part of the real estate; and so, if turned into money for the convenience of the estate. *Inwood v. Twine*, *Amb.* 417, was a case of an infant purchasing in a jointure estate; and is rightly stated there with this additional circumstance, that the mother, who was the jointress, concurred in the petition to have the jointure estate purchased in for the benefit of the infant. That was determined against the widow, claiming as administratrix; and goes farther than any case; as according to that even if guardians or trustees do it without an order by the Court, and not wantonly, but prudently, the property shall be changed; which seems to have been excepted in the other cases. *Lord Northington* there laid stress upon the acts

1792.

~  
BROMFIELD,  
*Ex parte.*

[ \*455 ]

of the infant, considering it as real estate; and therefore thought, it ought not to be changed for her personal representative. Search has been made in the office for lunatics; and no order has been found, that intimates any intention in the Court to change the right so as to give it to the next of kin instead of the heir. The earliest is 13th of *March*, 1764, in the matter of *Anne Hunt*. There all directions as to the application of the money were expressly reserved; and there was no dispute afterwards, I believe, because the same person was heir at law and next of kin. In the matter of *Grimstone*, 2d *Nov.* 1771, the Court paid the money to the heir, the property not being changed. In the matter of *Calthorpe*, 31st *July*, 1786, it was ordered to be placed to the credit of the matter, under the title of the lunatic, to the timber \* account; which seems, as if your Lordship thought, it was afterwards to be considered, to whom it should belong: otherwise it would not have been kept as a separate account, but would have been ordered to be paid in generally to the credit of the lunatic. In the matter of *Bevan*, 11th *March*, 1771, before Lord *Apsley*, the lunatic being in debt by specialty, it was ordered, that the residue of the money after paying costs should be applied in discharge of his specialty debts. The particular ground for applying it to the specialty debts does not appear; perhaps it was, that those would fall on the real estate. The result of the cases is, that, where it is cut, not by order of the Court, the nature of the property shall not be changed; and that it is done by order will not vary the case. It is exactly the same, if it is prudent, whether it is done by order, or not, but afterwards approved by the Court, as prudent. There is no reason, why the heir should have it in one case and not in the other. There is but one case, in which the nature of the property was changed; that was *Shelly's* case, in 1773: but there was no contest; and the same Solicitor acted for all parties.

*Solicitor General* and Mr. *Mitford*, for the next of kin.

The principle of all the cases is, that, where the property of an infant or a lunatic is concerned, the Court will not permit a wanton change of the circumstances of that property to change the rights of his representatives after his death. But  
for

for that it must be a wanton change, or what is considered as equivalent to that; as if there is not a sufficient necessity. Lord *Northington* in *Inwood v. Twine* considers it so; and referring to *Lord Winchelsea v. Norcliffe*, 1 *Vern.* 435, proceeds thus: "It is there said, the Court might do it by decree: it is here done by order: that makes no difference. It is there said, trustees cannot do it at their will and pleasure: I subscribe to that opinion, that they cannot do it wantonly; but the Court will support them, where it is manifestly for the benefit of the infant." That case of *Lord Winchelsea v. Norcliffe* was decided with considerable solemnity before the Lord Chancellor, the Master of the Rolls, Chief Baron Atkins, and Mr. Justice Lutwyche. Trustee of an infant's estate with the savings of the real estate purchased lands, situated commodiously for the benefit of the infant, in case when of age he should accept it. He died under age; and the question was, whether the heir should have those lands; or the trustee should keep them, and account for the money to the administrator. Mr. Justice Lutwyche held, that the trustee should keep them: and account to the administrator: but he seems to have been of opinion, that, if the title had vested in the heir by the conveyance, his judgment would have differed considerably. The Chief Baron was of the same opinion. The Master of the Rolls differed, and held, that the heir ought to have the lands. He took notice of *Dennis v. Badd*, to shew that a mortgage, bought in by the committee of an idiot, would not go to the personal estate. The Lord Chancellor agreed with the Judges; and said, there was a difference between that case and *Dennis v. Badd*; for in the latter, if the money had come to the hands of the executor, it would have been liable in equity to the mortgage debt; and the heir might have compelled the application of it to that. The Lord Chancellor admitted, that, if the Court had seen upon application, that it was for the benefit of the infant, the Court might have changed the property. Therefore they considered the manner, in which the trustee had treated it as very important; and upon finally disposing of it they held, that this purchase was so far to be considered as a proper act for the benefit of the infant, that the trustee was to account for the rents and profits of the lands only, and not for the interest of the

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the money. *Vernon v. Vernon*, decided by your Lordship, was similar to *Lord Winchelsea v. Norcliffe*; except that in the former it was clear, that the trustees acted right; in the latter it was laid out merely as being commodious; which is a great latitude. In *Vernon v. Vernon* an estate was given to an infant on condition of paying as much from his personal estate as had been paid for the purchase of the estate. The trustees applied the personal estate according to the condition; and your Lordship thought, the personal representative had no right to call it back; as the change was not made wantonly, though without order; but was for the benefit of the infant in pursuance of a condition, by which he was to hold beneficial property, which he could not otherwise have had. In *Ex parte Ludlow*, 2 Atk. 407, Lord Hardwicke was of opinion, that committees, &c. might exercise the same power as to cutting timber as any other discreet person, being absolute owner; but, as in that case they appeared to have applied the personal estate with regard to their own interest, they were ordered to make it good. Suppose a fire had broke out in a lunatic's estate, consisting of buildings; the Court would direct the personal estate to be * laid out upon those buildings, though against the personal representatives and for the heir; being that, which a discreet owner of the estate would do. *Shelly's case*, which is strongly in point, was contested by the heir. The first application was adverse. An elder brother, originally committee, was discharged; and a younger brother appointed. When the order for cutting the timber was made, the heir did oppose: but upon the order for distribution of the money to those entitled after the death of the lunatic it does not appear, that he did oppose; and the words of that order do import consent: it recites the several parties as appearing by Counsel, and among them the heir; and says, that, they severally consenting to the prayer of the petition, it was ordered to go to the personal representative. That does not shew, the whole matter was with consent of the heir. He considered the first order as deciding it, and therefore did not oppose upon the second. There are other cases, in which the Court has considered the power, it has to dispose of the property of the lunatic in this way, as depending on the propriety of the application. In

Beran's

Bevan's case it was applied for debts; for specialty debts, it is true; yet that would alter the state of the funds at his death as between his personal and real representatives; as, unless the heir had a title to be reimbursed out of the personal estate in respect of what the real discharged, this was as much a conversion as to him as any other conversion. In *Tullit v. Tullit* it does appear, whether it was for the benefit of the infant to cut the timber or not. The guardian did not cut by authority of the Court; therefore it stands indifferent upon the report. The distinction, taken there, that guardian may alter the nature of the property of infant tenant in tail, not of infant tenant in fee, is singular. A remainder-man has as strong a claim as the heir apparent of tenant in fee. The reason given in support of that distinction, that it must go to the remainder-man, and then would not be for the benefit of the infant, but lost to his family, is not satisfactory. But that shews, the Court looks to the fact, whether it is for the benefit of the infant or not; and the circumstance of his being tenant in tail, instead of tenant in fee, is enough to influence their judgment upon that. *Mason v. Mason* was the *Norfolk* case, mentioned by Lord *Hardwicke*, 2 *Ves.* 384. In that case the Court proceeded to execute the contract; and acted inconsistently with what was done in other cases, if they ordered it to be cut for the benefit of the infant, and at the same time to be considered * as real estate; and if it was considered as a wanton change, and therefore as not changing the rights of the representative, it was wrong to proceed any farther. Either way that case is bad. In 2 *Ves.* 384, there is only a *dictum*; and the language of the *Chancellor* has not much connexion with the case, upon which he was giving judgment. It is impossible to say, that, if the Court directed it rightfully, and the committee did it wrongfully, in both cases it is to go to the heir. In *Hunt's* case in the same lunacy, that is mentioned for the petition, on the 30th of *December*, 1777, the money was on petition of the persons, appearing to be next of kin, ordered to be paid to them; and no question was made by the heir. In *Grimstone's* case the application was by the heir at law. The timber was there cut by the agent of the committee under pretence of repairs and decay without order and without the knowledge of the committee or the receiver.

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ceiver. On the 8th of *August*, 1772, before Lord *Apsley* in the same case there was no dispute. In 1787, in the matter of *Clarke*, a lunatic, it was ordered to go with the rest of the personal estate to the residuary legatee. If the principle, contended for by the petitioner, had existed, it must have made a different decision in *Hearle v. Greenbank*, 1 *Ves.* 298, as to the freehold lease, which was originally leasehold. In *Sergeson v. Scaley*, 2 *Atk.* 412, at the time of the purchase of real estate with part of the personal the understanding of the party was very much impaired; and it was doubtful, whether he was competent to assent; but, as it took place two years before the commission, Lord *Hardwicke* would not recal it. He seems to have concluded, that, if the property is meliorated by the act, the Court will do it, unless in that case the next of kin, or in this the heir, can shew good reason to the contrary. In *Ex parte Grimstone*, *Amb.* 706, there was a change by order. It was judged proper to apply the savings of the personal estate in paying off mortgages. This was done; and Lord *Northington* directed, that the terms should attend the inheritance. Lord *Apsley* first thought that order wrong; and therefore declared the trustee, to whom the terms were assigned, to be a trustee for the next of kin to the extent of the sum applied in discharging the mortgages. Afterwards on a rehearing of the petition, on which the last order was made, the *Lord Chancellor* was assisted by Chief Justice *De Grey* and Baron *Smythe*; and he changed his opinion, agreeing with the Chief Justice, that the order, made by Lord *Northington*, was right, and the last order wrong, against the opinion of the Baron; and the *Chancellor* laid down the

* general rule, that the estate of a lunatic is not to be altered, with this qualification, that that rule must be properly understood; that the real principle in managing a lunatic's estate is to do what is for the benefit of the lunatic; that, if in all cases all the savings of the real estate should go to the next of kin, it would invert the principle; that the Court every day lays out those savings in repairs and discharging incumbrances on the real estate; and that, though the case of an infant differs from that of a lunatic, as the former can dispose of personal estate sooner, than he can of real, yet in many cases the Court will order the money of an infant to be laid out in dis-

charging

charging incumbrances, and even in keeping up houses and gardens, as in the case of Lord *Shaftesbury* lately. If the principle will apply in favour of the heir, it will for the next of kin. In Mr. *Selby*'s case there was a devise to his mother on trust, after paying certain charges, to convey to Mr. *Selby* himself. If she had made a conveyance, he would have taken as a purchaser, and it would have gone to the heir *ex parte paternâ*: as she did not, it descended to him from her. He had both the equitable and legal title. After his death it was claimed by his paternal heir; who filed the bill. Your *Lordship* thought, there was no such equity; that, as it was indifferent to him, in which way he took, the right of devolution to the heir must fall according to the accident; and the bill was dismissed. Here there is nothing to create an equity for the heir to have this personal property again converted into real. This being a case, in which the timber has been cut by the Court for the benefit of the lunatic, and the produce having been carried to the account of the lunatic's estate, it is to be considered as personal estate; and whatever is the case, where it has been cut wrongfully, yet, where the Court has said, it is for the benefit of the lunatic, and there is no attempt to shew surprise, the Court has never assisted the heir against the personal representative. The report, upon which the order to cut was made, clearly shews, that it was for the lunatic's benefit: as this timber was decaying daily, and occasioned daily injury to the rest of the estate. Therefore if he had lived, he would certainly have been injured, if it had not been cut. If it was necessary to increase the allowance of a lunatic, the Court would cut down timber, not decaying, if it would render his state more comfortable.

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In *Shelley*'s case the first order was made upon the application of the committee without any notice, as appears, to the heir. It afterwards passed without argument; and in the presence of the Counsel for the heir among the rest, who, as the order recites, severally consented, the distribution was made. So in the first case it was in his absence; and the next time it was by consent of all parties. As to the other cases, in that of the lunatic it was evidently for the improvement of the real estate;

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estate; and there is nothing in the statute, giving the Court its authority with regard to lunatics, to prevent the application of the personal estate to improve the real, which was the object, by buying in the mortgages. In *Lord Winchelsea v. Norcliffe*, there being no election, all the other questions were out of the case. *Vernon v. Vernon* was only a case of a condition for the benefit of the infant. In *Hearle v. Greenbank* the trustee was obliged to take the best estate he could get. *Ex parte Ludlow* only shews, that a committee may repair the estate of a lunatic. *Sergeson v. Sealey* was not a case of an infant or a lunatic; neither was *Selby's case*; which was only a case of two rights.

Lord CHANCELLOR.

The answer to that case is, that the equity merged in his life.

Reply.

What is said in the *Marquis of Anandale's Case* is the reasoning of the Court on the case, and not a loose *dictum*. Except in *Inwood v. Twine* there is not a hint, that the property can be changed. It is no wonder the Court is so cautious. The statute, providing for lunatics, *De Prærog. Regis* 17 Ed. II. c. 9 and 10, says, that their lands and tenements shall be kept without waste, and that the residue beyond their maintenance shall be kept to their use, to be delivered to them, when of right mind, so as that such lands, &c. shall in no wise be aliened. This Court has no more authority to cut timber upon the lands of a lunatic than tenant for life has: it would be waste in both. However, where it would be mischievous to let it stand, the Court may under the power it has long assumed order it to be cut: but in that case it ought to be considered as standing. Tenant * for life cannot cut it, if ever so advantageous for the remainder-man or reversioner, unless they choose. It may be said, there is a difference between the authority of the Court over lunatics and idiots with respect to their real and personal property. As to the real there are express restrictions from waste and alienation: the other depends upon the general jurisdiction of the Court as guardian, where there is no other, and as superintending the conduct of guardians.

Lord CHANCELLOR.

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If there is any principle, to which these cases can be brought in order to make them consistent, I have not observed it upon the statement of the cases now; as I think, some of them in their decisions, many in their sayings, have a repugnance, that will require farther examination: therefore I will look into them, and particularly the collection of Orders in this Court, which have been stated. If I am at liberty to follow the principles and reasons of natural justice, they are very strongly expressed by Lord *Northington* in that case in *Ambler*. It is said, that by the statute of provision for lunatics the Court cannot meddle with the estate in cutting timber. If that is true, it proves, that the Court cannot upon any account whatsoever apply the timber, growing upon a lunatic's estate, even to the most urgent personal occasions of the lunatic; that, though he was pressed with debts, which rendered his maintenance impossible, or which would bring his person into a gaol, (for he must be sued for his debts), the Court could have no right to cut the timber, as the King has promised to keep his lands without spoil or waste. I doubt, whether it is possible to assimilate the case of a lunatic tenant in fee to that of tenant for life impeachable for waste; as the latter has no property in the timber at all; and therefore waste by him has a different consideration from that waste, mentioned in this statute; which only means without destruction; and does not hinder the committee under the authority of the King from making use of those opportunities, which the property of the lunatic would enable him, if in possession of his senses, to make use of, to deliver himself personally from any pressing urgency. When that is gone, I cannot distinguish between lunatics and infants; and if not, there are, I conceive, many cases, which prove this power more distinctly than the case of lunatics do; though that of *Grimstone* goes a good way. It is said, the Court has more power over the personal than the *real property of lunatics: that goes back; and insists, that the authority of the Court does not go to touch any part of the inheritance, or to diminish it; as it is to be kept without waste or alienation. It is clear, that in estimation of law at the death of a lunatic under these circumstances this money is part of his personal property.

Waste in the statute providing for lunatics means destruction, not that, from which tenant for life impeachable is restrained.

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property. Suppose, simple contract creditors of the lunatic were to be paid: it would be difficult under such a pretence of equity as the heir now makes to contend for the application in his favour, not only against personal representatives in general, but against the creditors. When once I consider this as part of his personal estate, I cannot reason it out of that case but upon the supposition of an equity for the heir to recal the legal situation of the assets of the lunatic, and to apply them to his use; and I conceive that to be difficult; and that the case does not warrant me in doing it upon other grounds than this; that, where a committee or guardian is entrusted with the care of an estate, and has abused that trust with a view of changing the quality of the estate to serve his own interest, there arises an equity to undo the act, tortious in that way. But I know no rule of equity upon a less ground than that. Perhaps the Court, where guardians or committees have without order taken upon themselves to change the property, will, particularly where there is a cause in Court, consider it as a matter of fraudulent management; for that is the ground, upon which the Court must proceed. I think, I remember an application once, where timber had been cut down by a stranger tortiously; and it was insisted, that by equity it ought to be restored to the estate; and it was refused; as there was no abuse of confidence, but it was the tort of a stranger; and, being so, it was held, that there was no equity upon the subject; and, I think, the law now is, that, if timber was cut down so, it would be like the case of windfalls, and ought not to be restored by equity (22). Considering it so, it is impossible, where the Court, taking those precautions, it always does, and ought, to take, not to do it idly or unnecessarily, but for the benefit of the lunatic or infant, thinks proper to cut timber, and convert it, to conceive an equity to change the condition of that, when become per-

(22) So, when the conversion was the effect of an improper execution of an order of Court: *Flanagan v. Flanagan*, stated post, Vol. II, 77. See *Browne v. Groombridge*, 4 Madd. 495; where the application of property during the testator's incapacity, held a due conversion as against the next of kin, though evidently proper, does not appear to have been under any legal authority.

sonal property, and to replace it for the heir; as it is truly said, that being done for the benefit of the infant, it becomes indifferent, whether it is to be for the heir or personal representative afterwards; and it cannot be recalled in either case; and, as the cases are quoted, particularly that before Lord * *Bathurst*, they have gone upon that idea, that, where it is found to contribute to the interest of the party to make the change, that has been thought so good a reason for it as to exclude all considerations of hardship, or an equity between representatives. When I have said all this, I must observe, that the Court ought to be very reserved in changing one species of property into another, and to do it only upon pressing occasions; and when it is done, the only ground, upon which I can give it out to the one party or the other, must be an equity so distinct as to govern it upon the proper rules of law; as this is not the *forum*, that ought to decide in nice cases, on account of the difficulty of getting the decision reversed; but, if it is of great consequence, it ought to be put into the shape of a bill. If that is to be done, I hope, the bill will be drawn like a case, and the answer in the same way; and that I may not by saying this institute an expensive suit. It is only necessary to state the sum raised by cutting the timber, and the order, and the equity arising for the heir to have that sum paid to him; as, although it is proper to change the property, yet it is not proper to do so against the representatives. In the mean time I will look over those cases, and see, whether I can make any thing more of them (23).

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(23) A bill was afterwards filed by the heir at law, and dismissed: post, *Oxenden v. Lord Compton*, Vol. II, 69. See Lord *Loughborough's* opinion in that case; and *Walker v. Denne*, *Lord Compton v. Oxenden*, *Chitty v. Parker*, II, 170, 261, 271, corrected by Lord *Eldon*, ante, 205, n.

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May 2d.

3Bro.C.C.516.

Demurrer.

To bill by assignee of judgment assignor is a necessary party. Creditor by judgment in *Jamaica*, filing bill here for satisfaction from rents and profits remitted and to be remitted, must shew his judgment to differ from judgment here, so that he cannot affect the land.

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No equity for judgment creditor, because there are prior judgments.

CATHCART v. LEWIS.

THE bill stated, that the Plaintiffs were creditors of *William Lewis* by judgments in *Jamaica*, and as assignees of other judgments there; that after those judgments the debtor conveyed to his brother *Matthew Lewis* in trust to pay *William* an annuity of 3000*l.* for maintenance; and there was a provision for a debt of 2000*l.* due from *William* to *Matthew*, and for some other debts, but none for those due to the Plaintiffs. The bill charged, that soon after the execution of the conveyance *William* went abroad, and was out of the jurisdiction; that a much larger sum, than would be sufficient to satisfy the Plaintiffs, had been remitted from the rents and profits; and that they could not be paid under the judgments on account of prior judgments. The object of the bill therefore was, that the *rents and profits received by the Defendant *Matthew*, and the future rents and profits to be received by him, might be liable to the debts of the Plaintiffs. To this bill there was a general demurrer.

Lord CHANCELLOR.

The Plaintiffs cannot go upon one branch of their bill, because being assignees they have only an equitable title, and they have not brought the assignors before the Court. But they seem to have no demand here whatsoever. Being judgment creditors in *Jamaica*, they ought to tell me the effect of those judgments upon the land. If it is any thing like the effect of judgments here, it is open to them to take advantage of them by *Elegit* or Ejectment: if not, they ought to tell me, what it is. They say, they cannot take advantage of the judgments, because the land is protected by prior judgments; but that is no equity. Therefore the demurrer must be allowed upon the prayer of the bill.

MOGGRIDGE v. THACKWELL.

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May 4th.

7th and 8th.

3Bro.C.C.517.

ANN CAM made her will *June* 16th, 1799, giving several annuities, charged on her real estates, and among them 15*l. per annum* to *Elen Pheasant*, her late servant; and, among several legacies to charities and individuals, to her servant *George Elliott* 200*l.* unless otherwise provided for by her in her life-time. She afterwards made four codicils, of which the two first contained legacies to the same persons very nearly similar, and in nearly the same terms. The first question was, whether those legacies in the second codicil were to be considered as additional or as mere repetition. The first codicil was in the hand-writing of the testatrix; and in the following words:

“ A codicil to my last will and testament, which I desire
 “ may be taken as a part and parcel thereof: I give to *Peter*
 “ *Triquet*, esq. of *Craven-street*, 100*l.*; to *William Pollock*, esq.
 “ of *Downing-street*, *Westminster*, 100*l.*; to *Elizabeth Thack-*
 “ *well*, eldest daughter of *John Thackwell*, of the parish of
 “ *Berrow*, in the county of *Worcester*, 600*l.* 3 per cent. conso-
 “ lidated bank annuities, with the dividends to be accumu-
 “ lated from my death to the time she shall attain the age of
 “ 21 years; to *Robert Woodford*, esq. I give 500*l.*; to *Judith*,
 “ the second daughter, I give the sum of 600*l.* stock, with the
 “ interest that shall be accumulated when she attains the age
 “ of 21 years; and to the four youngest daughters of the said
 “ *John Thackwell*, *Margaret*, *Mary*, *Sarah*, and *Nancy*, I give
 “ 400*l.* each in stock with the interest * that shall accumulate
 “ till they arrive at the age of 21 years; and if any die before
 “ they attain the age of 21 years, that child or children's por-
 “ tion shall be divided amongst the rest of the other children;
 “ to *George Elliott* I give 100*l.* over and above what I have
 “ left him in my will. In witness whereof I have hereto set
 “ my hand and seal this 12th day of *April*, 1780: *Ann Cam.*”

Legacies near-ly similar given to the same persons by different instru-ments: lega-tees not en-titled to both. Request to A. his executors and adminis-trators, desir-ing him to dis-pose in such charities as he thinks fit, re-commending poor clergy-men with large families and good charac-ters: A. died nine years be-fore testatrix, who had no-tice of that: executed by the Court by reference to the Master to settle a plan having parti-cular regard to that recom-mendation.

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The legacy to *Elizabeth Thackwell*, as it stood generally in the first codicil, was 600*l.* stock generally; but had been altered by striking out the word “*stock*,” and interlining in the

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the hand-writing of *Robert Woodford* the words “ 3 per cent
“ consolidated Bank annuities.”

The second codicil was in the hand-writing of *Robert Woodford*, and in the following terms:—“ A Codicil to my will,
“ which I desire may be taken as part and parcel thereof. And
“ I give to *Peter Triquet*, of *Craven-street*, esq. 100*l.*; and the
“ same to *William Pollock*, of *Downing-street*, esq.; I give to
“ *Elizabeth Thackwell*, eldest daughter of *John Thackwell*, of
“ *Berrow*, in the county of *Worcester*, Gent. 600*l.* 3 per cent.
“ Bank annuities consols; and I order my executors to accu-
“ mulate the dividends thereof for her benefit, and the prin-
“ cipal and such accumulations to be paid to her on her arrival
“ at the age of 21 years; the same to *Judith*, another daugh-
“ ter, on the same terms; and I give 2000*l.* 3 per cent. Bank
“ annuities consols to the other daughters of the said *John*
“ *Thackwell*, equally to be divided between them as shall be
“ living at the time of my decease, but on the same terms as
“ their other sisters legacies and accumulations are ordered:
“ but my will is, that if any one of the daughters of the said
“ *John Thackwell* shall die before their respective attainment
“ of 21 years, I order each daughter’s legacy with the accumu-
“ lations to be equally divided amongst her surviving sisters;
“ I give to *Elen Pheasant*, 5*l.* per year, during her life more
“ than I have given her by my will; and I give to my *George*
“ *Elliott* 100*l.* more than I have given him by will, provided he
“ shall be in my service at the time of my decease. In witness
“ whereof I have hereunto set my hand this 10th day of *May*,
“ 1780. *Ann Cam.*”

Third Codicil—“ I desire after my death that if my ser-
“ vant *George Elliott* likes to continue at *Dymocke*, he may
“ be retained with a salary of 50*l.* a year to do all the busi-
“ ness that is to be done in the country; which I think will
“ be of great use to the executors.”

By the fourth Codicil she desired that *George Elliott* may
have 20*l.* in lieu of what may be owing to him on the face of
the books; and that his account may be taken; as she had
not the least doubt of his integrity. These two Codicils were
in the testatrix’s hand-writing. *Woodford* died in the life of
the testatrix.

The second question was upon the following bequest in the will (24) to *James Vaston*; who was not one of her trustees for the general purposes of her will: "I give all the rest and residue of my personal estate to *James Vaston*, his executors and administrators, desiring him to *dispose of the same in such charities as he shall think fit, recommending poor clergymen with large families and good characters."

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Vaston died about nine years before the testatrix; who had full knowledge of his death: but never made any alteration in that residuary disposition. The question upon this was, whether that charitable bequest could be executed by the Court.

Attorney General, and Mr. *Stanley*, for the Charity.

The trustee being dead in the life of the testatrix, the fund ought now to be applied at the discretion of the Court; *Attorney General v. Siderfen*, 1 Vern. 224. There the paper, which was to regulate the charity, was wanted; here the person, who is to regulate it, is dead. *Attorney General v. Hickman*, 2 Eq. Ca. Ab. 193, is exactly this case, the person having the discretion being dead. The object here is as certain as there. In *White v. White*, 1 Bro. C. C. 12, your Lordship recognised the principle of these cases. There a testator struck out a trustee's name, and did not appoint another; and your Lordship did not think it a revocation. A case was there cited, in which *A.* was pointed out by the will to distribute at the discretion of *B.* and *C.*: they both died; and it was considered to be such an indication of a general charitable purpose, as that it could be applied by this Court. *Doiley v. Attorney General*, 4 Vin. 485. 2 Eq. Ca. Ab. 194, and *Widmore v. the Governors of Queen Anne's bounty*, 12th Dec. 1766, 1 Bro. C. C. 13, n. are cases in favour of the charitable bequest. The principle now established is, that if the objects are pointed out with a sufficient decree of certainty, and if it has happened, that the directing discretion is not in existence at the time, it falls within the rule, that it is to be directed by the Crown, as this Court thinks fit, by reference

(24) The will is stated very particularly upon the rehearing on this question: post, Vol. VII, 36.

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reference to the Master to consider of a plan; which must be done in this case.

Solicitor General, Mr. Mansfield, Mr. Mitford, Mr. Barton, and Mr. George Wilson, for the next of kin.

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The first question is plain; for the rules laid down upon double legacies (25) are rules applied to cases, in which there is no evidence of intention upon the papers to be construed. In *Hooley v. Hatton*, 1 Bro. C. C. 390, in the report of *Ridges v. Morrison*, Mr. Justice Aston states the general rule, that where the same persons have legacies under different instruments, they * are double legacies: but upon the whole they are not so here, except those to *Elliott* and *Pheasant*. In giving the legacy to *Elliott* in the second codicil, with that expression "more than I have given him by my will" she could not mean to give him that 100%. not only above what was given to him by the will, by also above what was given to him by the first codicil, by which she had given him that 100%. above what he had by the will. She considers the will and codicil as different things.

Lord CHANCELLOR.

If she had distinguished the codicil from the will, that is a fair argument: but there is no expression to shew that.

For the next of kin.

She introduces it by a clause declaring it to be a codicil to her will to be taken as part thereof. Unless she considered the first codicil and the will as the will, there is an inference that she meant to substitute the last codicil for the first, if the general effect of the first is attended to. In the gift of *Elen Pheasant* in the second codicil she could not mean by the word "*will*" both the will and the first codicil; for *Pheasant* took nothing under the first codicil. The other legacies are almost transcripts of those in the first codicil without any such addition,

(25) Post, *Allen v. Callow*, *Benyon v. Benyon*, *Currie v. Pye*, *Barclay v. Wainwright*, *Hodges* XVII, 34, 462. *Hurst v. Beach*, v. *Peacock*, Vol. III, 289, 462, 5 *Madd.* 351. *Att. Gen. v. Harley*, 4 *Madd.* 263. *Gillespie v. Holford v. Wood*, IV, 76. *Osborne v. Duke of Leeds*, V, 369. *Alexander*, 2 *Sim. & Stu.* 145.

addition, as there is to the legacies of *Elliott* and *Pheasant*: and though there are slight variations in expression, there are none in substance. *Woodford's* legacy is the only one omitted in the second; which probably proceeded from delicacy, and a wish that the legacy to him should not appear in his own hand-writing, but should remain in her's. In the *Duke of St. Albans v. Beauclerk*, 2 *Atk.* 636, Lord *Hardwicke* necessarily held it to be repetition from the internal evidence arising from the instruments, and that they should not all have effect, except so far as they differed. There were there four codicils and many specific legacies, which made any other construction as to them impossible: and as it was clear as to the specific legacies, Lord *Hardwicke* was of the same opinion as to the pecuniary. This is like that case and *Coote v. Coote*, 2 *Bro. C. C.* 521. If the general scheme of the latter is to repeat all in the former, and more particularly if any of the dispositions in the latter have expressions, shewing that some shall be accumulative, that will be sufficient to rebut the general rule mentioned by Mr. Justice *Aston*. The words in the two codicils are so nearly similar, that the latter must be considered as a substitution for the former, drawn up more correctly and with a few variations by a man of business. *Woodford* had attempted to make alterations in the first, and finding the paper run short wrote the whole over again. *Coote v. Boyd*, 2 *Bro. C. C.* 521, is not distinguishable from this case. There your Lordship thought, that notwithstanding parol evidence of an intention to make a farther provision, and that there was more property, the second codicil must be a substitution for the first. Generally speaking, dispositions to the same persons by different instruments are in accumulation without a particular reason to the contrary; if by the same instrument, it is generally considered as a mistake, and they are not double. Where it is by different instruments, it must be founded upon this, that there is no reason for making the second but to give additional legacies.

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Upon the other point; the Court has acted very arbitrarily in these cases, because the word "*charity*" is found in a will. It is not reasoning. But though they have gone great lengths to support bequests to charitable purposes, this is dis-

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tistinguishable;

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tinguishable; and it cannot now have effect on account of the death of the trustee in the life of the testatrix. This residue she did not give to the persons, who were trustees for the general purposes of her will, but to *Vaston*, his executors and administrators, desiring him (but not repeating the words "*his executors, &c.*") to dispose of it in charity with that recommendation. The general principle I allow, and that the only ground for opposing this charitable bequest is, that it is so imperfect, that it cannot be rendered perfect. The distinction in this case is that, which your Lordship had in view in *White v. White*: it is not a gift to any charity, but to him to give to a charity if he thinks proper. In that case your Lordship pointed to that distinction, and finally decided not upon a ground waiving it, but upon this, that the testator, though he had not named the person to select the various objects, who were to take, yet had furnished the Court with objects, out of which the Court was to make the selection because he had named the *Lying-in-Hospital* as the species of charity to take. That particular species of charity being named, it was held, that the Court would support that: but if it was, to such as the executors should appoint, without pointing to any particular object, that could not be supplied. In *Wheeler v. Sheer*, *Mos.* 288, the residue was given to the executors for such charitable purposes, as the testator should appoint; and he died without appointment: the Court refused to appoint for him. It is difficult to distinguish that case from this. Here the testatrix has given nothing to any charitable purpose, but personally to the trustee to appoint. She ~~must~~ have contemplated, either that he was to outlive her or not. By his death nine years before her the gift lapsed; and she was for nine years together in the situation of a testatrix giving to such uses, as she herself should appoint; for she did not mean the confidence to go to his representatives, as she meant the legal interest to go. *Attorney General v. Siderfen* is distinguishable. There was there no pretence, that in the original constitution of the legacy there was any thing incomplete. If did not appear, what became of the writing containing the directions, how the sum was to be applied. There was no evidence, that the testator had destroyed it; nor could there be any; for that fact would have been a revocation. Therefore

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Therefore they had under his hand, that he had given that sum to charitable uses; and it only establishes, that in that case the purpose shall be perfected.

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Baxter's Case was very strong, and perhaps would not now be followed. The legacy was deemed to be void, because for forbidden uses (26); and yet the Court thought, that, as it was declared to be for charity, it should go to charities to be declared by the Court. I do not mean to state that as an authority; for it is very hard indeed, that the Court should give it to other charities, because those, which were mentioned, could not take (27).

For the next of kin.

Attorney General v. Hickman is also distinguishable. The objects of the charity were there defined by the testator himself, viz. *Non-conforming Ministers*. The trustees could only give it to that species of charity. *Doiley v. Attorney General* is not an authority upon this question. There it was given to trustees,

(26) See post, *The Attorney General v. Fowler*, Vol. XV, 85, and the note to p. 88. “lar ejected ministers, to be “ named by *Baxter*; and as if a “ legacy to those 60 individuals.”

(27) The decree in *Attorney General v. Baxter*, 1 Vern. 248, declaring the charity for the ejected ministers void, and that the legacy should be applied to the maintenance of a chaplain in *Chelsea College*, was reversed in *Attorney General v. Hughes*, 2 Vern. 105; not upon the objection here taken to the first decree, but upon the ground, that the charity directed by the will was not void; and by the decree of reversal the money was ordered to be distributed according to the directions of the will; being, in Lord *Hardwicke's* words, “ really a legacy to 60 particu- See post, Vol. IV, 433; the note to *Corbyn v. French*. VII, 76. The principle of *Cy pres*, in the full extent to which it was carried by the first decree in *Baxter's Case*, *Attorney General v. Combe*, 2 Ch. Ca. 18, and *De Costa v. De Pas*, Amb. 228, (corrected from Lord *Hardwicke's* notes, post, VII, 76, 77,) was established upon a review of all the authorities by Lord *Eldon*, affirming Lord *Thurlow's* decree in *Moggridge v. Thackwell*, post, VII, 36. *Attorney General v. The Coopers' Company*. *Mills v. Farmer*, XIX, 187, 483. 1 Mer. 55.

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trustees, their heirs and assigns, for such charitable uses, as they, their heirs and assigns, should think fit. The bill was to have new trustees appointed, one refusing to act, and the others being very old. There the new one was to all intents and purposes within the description. The great difference between such cases and this is, that this testatrix knew, that no person answering *the description, she gave, could exist at her death; and there is no such designation of any charity, as the Court has found in all the other cases. It is even disputable, whether there is a trust at all. Though words of recommendation will raise a trust, yet that is only, as your Lordship has in many cases stated, where the subject to be held in trust is certain, which, I admit, a residue is, and where the objects are also certain. Though in general cases a bequest to a person, his executors and administrators, has no other effect than a gift to himself, and the nomination of them will not carry the beneficial interest to his representatives, if he dies in the life of the testator, yet the use of those words may be considered as to the intention of the testator to create a trust in the person, to whom property is so given. This testatrix does not desire any person to execute the trust except himself. The objects are not so named as in that case of the non-conforming ministers, in which it was impossible to give it to any other persons. Though they might have varied the proportions, they were strictly confined to the objects. This testatrix only recommends poor clergymen. If the trustee could not dispose of it otherwise than in charity, it left him at full liberty as to the species of charity, to which he would give it; and those recommendatory words were only a hint to him, who was a quaker, of her inclination. *Harding v. Glyn*, 1 *Atk.* 469, and a variety of other cases, cannot apply to this, because in them the objects of the trust were all certain; but there is no case, where a trust for particular persons, recommending other particular persons, amounts to an imperative trust for the latter.

Lord CHANCELLOR.

Is there any case, in which the immediate legatees have been deemed to have an absolute estate in themselves upon such a devise as this, and were not declared to be trustees?

Upon

Upon the question of recommendatory words it is only, whether it is given to the legatee for his own use, or whether he is bound by the recommendation. The great case of the *Duchess of Buckingham* turned entirely upon that. If the trustee had lived, and a plan had been laid before the Master, would not a provision have been made for the prior use pointed out by the testatrix herself, namely, for the clergymen of the Church of *England*? Is there any case, in which it has been held, that because the testator did not describe the object, but left it at large, therefore it is * void as to the charity? If these cases had never been determined, notwithstanding the doctrine of the civil law the fair way of deciding would be to say, that where the testator has not designed any particular charity, it shall be void.

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For the next of kin.

There is no case, in which the bequest has been held good, unless some particular species of charitable objects is selected in the will. The case in *Moseley* is not to be distinguished from the case now put: in the latter it is no more given to charitable purposes, than it was in the former without appointment. If a testator says, he gives to such charitable uses, as he shall appoint, the will is as complete, as if it was to such as *A.* shall appoint. There is no difference, whether the capacity of naming the persons is reserved, or the person, who is to name them, dies. In *the Duke of Marlborough v. Lord Godolphin*, 2 *Ves.* 61, 30,000*l.* was given by Lord *Sunderland* to his wife, and after her decease to such of his children as she should appoint, and for no other purpose whatsoever: it was determined, that as to what was not appointed, it lapsed. The Court thought, no child could claim unless by her appointment, as it was given to such, as she thought fit, not in such proportions only. In *Widmore v. the Governors of Queen Anne's bounty* the testator had by giving to some public charity given to all; for under those terms the disposition would be *ad libitum* of the person, who was to be his representative. But here the trustee has the power of not disposing of it, if he does not think fit. That is the construction in *the Duke of Marlborough v. Lord Godolphin* also. A general purpose of charity is said to be the ground, upon which

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which the cases have gone : here it is a specific purpose, to which the direction of the trustee is essential. *Attorney-General v. Lady Downing*, *Amb.* 550, in which the trustees died in the life of the testator, may be cited on the other side, but does not apply : there all the objects were pointed out ; and nothing was left to the trustees but to pursue certain modes in the execution of the charity for the benefit of those objects. In *Hibbard v. Lambe*, *Amb.* 309, this kind of discretion was expressly held to be purely personal ; and two of four trustees being dead, and another very infirm, Lord *Hardwick* held, that this Court could not enable new trustees to dispose of it. *Walker* one of the persons interested in the residue was entitled to the remainder in tail of an estate, of which she was tenant in tail ; \* and she expressly says, she meant to give him an equivalent. His only chance now is out of that charitable bequest.

Mr. *Selwyn*, Mr. *Sutton*, and Mr. *Burton*, for those, who claimed double legacies.

There is more than sufficient to pay these double legacies. The first codicil is in as good a form as the second. A man of business would have advised her either to revoke expressly the first codicil, or to cancel it, if such was her intention. The general rule is, that legacies given by two instruments, whether the same, greater, or less, are both to stand, unless an intention to the contrary appears. These rest entirely upon the two instruments, being simple legacies without any motive or cause assigned. In *Wallop v. Hewett*, 2 *Chan. Rep.* 37, double legacies were held to be distinct. *Foy v. Foy* before Lord *Kenyon* at the *Rolls*, 1st *Feb.* 1785. The only cases to the contrary are *the Duke of St. Albans v. Beauclerk* upon the internal evidence of the instruments, and the case before your Lordship of *Coote v. Coote*, or *Coote v. Boyd*, as it was called in 1789. But that was upon very particular circumstances. All the legacies in the first instrument were exactly the same as those in the second, except one of 5000*l.* to Miss *Monckton* ; upon which your Lordship thought, the latter was made on purpose to give her that legacy : besides the residue was given in exactly the same terms in both, which had much weight.

Lord CHANCELLOR.

The first question is, whether these legacies are to be considered as additional, or as only repetition. That question arises merely between the two codicils. With regard to the will the codicils are certainly additional; but the question is, whether they are so with respect to each other, or mere repetition. It is true, the general presumption is, that where a person leaves two different instruments, as a will and codicil, or two codicils, legacies given by both to the same persons are, generally speaking, to be considered as additional; and that presumption is upon the other side checked by this, unless there appears to be some intention to the contrary. I am sorry to say, it is left by former determinations upon very indistinct grounds; and it is a great inconvenience, when a question of this kind falls to be decided upon grounds not distinct. But it is impossible now to lay down a rule of discretion without departing from the cases; \* which have established first, that the second instrument is additional to the first, because *prima facie* there is no reason, why the second instrument should be made, unless the intention was to add to the first: but this of course must be checked by this, that if there is evidence, that instead of addition it was intended simply as repetition, it is not additional; and simple repetition, where it is exact and punctual, has been regarded as sufficient proof, that it is only intended for repetition; but especially if beyond that general article of presumption the second affords also other presumption of an intention to make it to explain the first; that purpose, if it can be manifested and properly produced by the form of the second, goes *a multo magis* to prove, that the second bequest, given only with such different terms as serve to assist that purpose, will be considered as a stronger proof, that they are the same legacies better and more correctly explained. I may state at the outset, that certainly it was not intended, that the second codicil should be a substitute for the first; that is clear, because by the first there is a legacy to *Woodford*, and none by the second; and there is no expression in the second purporting to adeem the legacies given by the first; and by law those cannot be adeemed by an instrument not relating to the first; and so foreign to it as the second codicil is in this case. If the second instrument makes

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Legacies to the same persons by different instruments generally presumed additional, unless contrary intent appears; of which simple repetition if exact is sufficient proof.  
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Legacies by one instrument not adeemed by a second, not relating to the first.

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makes any or all a repetition, it must be, because the second legacies purport to explain the first; and they are so exactly in the same words as to raise a probability from that circumstance; and standing in the context they are apparently an intention to recal the subject and repeat the instrument. She gave *Judith* 600*l.* stock, not stating what stock nor what fund, but leaves it uncertain; and that from carelessness and ignorance, thus making it uncertain what she intended to give; for that is so loose, that unless she could refer to other parts to make that certain and significant, which is uncertain, it is very difficult to understand that part. So in the bequest of 400*l.* stock to each of the four younger daughters of *Thackwell* she does not say what stock. As to them the last bequest is in expression somewhat more exact; but it is just the same thing. The bequest to *Judith* in the second codicil is in this way; "the same to *Judith* another daughter upon the same terms:" that is to correct the general phrase "*stock*" used in the former codicil; for by using the word "*same*" the stock is ascertained, which it was not before. So in the legacies to the other daughters there is a correction to \*specify the particular stock. It is justly contended upon the bequests to *Elliott* and *Pheasant*, that by the circumstance of referring in each of these to the will it is plain, she meant each to apply in accumulation to the will. If in other respects these codicils were so framed, that the presumption would have arisen from no other quarter, and if the legacies given by them had been upon different terms, and there was no other circumstance to control the inference from thence, those words "more than I have given by my will" in the second codicil might have applied to both the will and codicil. But the same interest being given in so nearly the same terms, those words fairly assist the inference, that in writing the second codicil she thought, she was doing the same thing as when writing the first, and making a gift additional to the will only: and to the apparent reason for repeating the legacies to the same persons may be added, if necessary, that the same person, who wrote the second codicil, began to write the interlineation upon the first, and found, that it would too much obliterate the first, and probably did not wish, that the legacy to himself should appear in his own hand-writing, but rather that it should remain in  
her's

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her's without any appearance of meddling on his part. But whatever the reason may be (to keep clear of too remote conjecture) it is plain, that within the reason of all former determinations there is too much evidence, that instead of intending this as additional, because there is no reason, why she should make it unless for the sake of addition, there is a very distinct reason to the contrary; and that becomes much enforced by the reference to the will only as the instrument, under which *Eliott* and *Pheasant* had legacies. Therefore each is ancillary to the will only; and these legacies are not additional.

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As to the charity, that question lies in a very narrow compass. That also must be determined by reference to the former decisions, and is bound by those to a certain degree; though perhaps if they had not existed in such a series as to have now distinctly established the rule of the Court, the question might now undergo rather a different consideration. Some argument was used with regard to those words whether precatory or jussory. Those I lay out of the case; because it is clear, that it is impossible to qualify this as a residuary bequest to *Vaston* for his own use. Under this will he cannot claim for himself. In the Civil Law and the books upon it the question goes to this \* whether such words do or do not bind the interest, which is otherwise absolute to the legatee; whether he is compelled to depart from his pretensions to the absolute interest by words sufficient to destroy the general effect of the legacy to him. But here it is only given to him for the purpose of erecting a charity; therefore at all events he is a trustee; and it is the same, as if she had herself given it to the charity specified, provided it is sufficiently specified, the same as if she had called him trustee; which in this Court extinguishes all pretensions whatsoever for himself (28). The circumstance of his death between the time of making the will and the death of the testatrix, and her consideration of that, must not direct the construction of a will. The Court cannot resort to circumstances of that kind, nor judge of her intention at the time of making the will by what she thought afterwards. Therefore it is the common case of a legacy lapsed by the

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Where legacy is given only to erect a charity, legatee is a trustee at all events, and can have no pretensions for himself.

Will not to be construed by subsequent circumstances.

(28) Post, *Brown v. Higgs*, Vol. IV, 708. V, 495. VIII, 561. XVI, 26.



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Trust legacy cannot lapse by death of trustee.

The most general gifts for charity executed.

Power to dispose to charities specified survives notwithstanding the death of the person to execute.

the death of the legatee. But it is known universally, that a trust legacy cannot lapse, because the trustee dies, but it survives for the benefit of the *cestuy que trust*. The only question therefore is, whether I am at liberty to say, these words are such a disposition, as this Court must find for that purpose. There are many cases, where the most general gifts for charity have been executed (29). The circumstance, that the trustee is unable by death to dispose of it, makes no difference, because it is a power given to a person. Suppose there was no gift, but only a power to the executor to dispose to such and such charities, there the charities survive. But here it is much stronger, because the testatrix has recommended a more particular charity than the general one. In that view it is impossible to say, the charity must not be sustained. Therefore refer it to the Master to settle a plan having particular regard to that recommendation; and let all parties have costs out of the estate, and as between attorney and client, since it is a cause between relations (30).

(29) *Att. Gen. v. Clarke, Waller v. Childs, Att. Gen. v. Herrick, Amb. 422, 524, 712. Att. Gen. v. Comber, 2 Sim. & Stu. 93.* (30) Decree as to the charity affirmed on a rehearing by Lord Eldon, *Moggridge v. Thackwell*, post, Vol. VII, 36.

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May 11th.

**3 Bro. C. C. 529.**

Lessor for lives under covenant to renew on expiration of one not bound if no application till two drop.

Where a cause is heard on bill and answer, only 40 shillings costs on dismissing the bill, unless a special case.

**BAYLY v. THE CORPORATION OF LEOMINSTER.**

**T**HE Plaintiffs were lessees for three lives under the Corporation, who were under covenants to renew on certain terms, when one life should drop. The lessees suffered two lives to expire, and brought the bill for renewal upon the original terms; which was resisted by the Corporation; as the lease provided for renewal, only when one life should drop and two remain, but not in the case of two gone and one remaining. They therefore insisted, that the lease must be upon their own terms.

*Attorney General, for the Plaintiffs.*

I cannot find any case for it; but upon the general principle the intent of the lease and covenants must have been, that whether



whether one or two lives had dropped, it should be renewable. It is matter of appreciation; and no loss ought to be sustained, where there can be a compensation.

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The lessees were not bound to renew, but were at liberty to let it run out, if they pleased; and they seem in this case to have made use of that. If they had confidence enough in that life to make repairs, and, now that it is nearly run out, wish to make a new bargain upon the old footing, they do not treat the Defendants fairly. But this case has been determined over and over in the House of Lords upon *Irish* cases (31).

Dismiss the bill with costs.

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On the 14th of *June* it was moved to vary this decree by reducing the costs to forty shillings according to the course of the Court, as the cause was heard upon bill and answer.

The *Solicitor General*, against the motion, cited an order made by Lord *Hardwicke*, that the Court should exercise their discretion \* in cases of that kind, and in future give costs in proper cases. The *Solicitor General* said, the practice was altered by this order, and that this was a proper case for costs; as what the Plaintiffs represented to be a little slip, was neglecting to apply for a renewal from the year 1763.

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*Lord* CHANCELLOR

Granted the motion; saying, the order by Lord *Hardwicke* did not alter the practice generally; but gave a discretion to vary it, if a special case was made (32); and this point was not raised when the cause came on.

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| <p>(31) Post, <i>Baynham v. Guy's Hospital</i>, <i>Eaton v. Lyon</i>, Vol. III, 295, 690. <i>Moore v. Foley</i>, VI, 232. <i>Iggulden v. May</i>, IX, 325. <i>The City of London v. Mitford</i>, XIV, 41. <i>M'Alpine v. Swift</i>, 1 <i>Ball &amp; Beat</i>. 285.</p> | <p>(32) See <i>Orders in Chancery</i>, Mr. <i>Beames's</i> edition, 450, and the note in 451. <i>Costs in Eq.</i> by Mr. <i>Beames</i>, 230, 1. <i>Rogers v. Goore</i>, post, Vol. XVII, 130. <i>Cowdell v. Tatlock</i>, 3 <i>Ves. &amp; Bea.</i> 19.</p> |
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May 14th.

## LEGARD v. HODGES.

3 Bro. C. C. 531.

Covenant to set apart and pay annual profits of land is in equity a lien on the land against the covenantor and claimants under him with notice.

**MR. HODGES**, tenant for life of estates in *England* and in the *West Indies*, by his marriage settlement, in consideration of 4000*l.*, the fortune of his wife, agreed that the said sum should, with 10,000*l.* to be paid by him, be laid out in trust to be applied to certain uses; and, in order to raise the said 10,000*l.* he covenanted with the trustees in the settlement, that he would set apart and pay to those trustees one-third part of the clear annual profits of his estates in *England* and in the *West Indies*. Afterwards, being pressed with debts, he conveyed his life estate, so bound by his covenant, to other trustees to raise 1000*l.* a year for himself, and, subject thereto, to pay off certain debts and incumbrances, the object of the last settlement, which took notice of the first. The bill was brought by the trustees under the first settlement to have a trust declared for the purposes of that settlement as to one-third of the clear annual profits of the life estate of *Mr. Hodges*. For the parties, claiming under the last settlement, it was contended, that under the first there was no lien upon the land but a mere personal covenant.

## Lord CHANCELLOR

Having taking a short time to consider this day delivered his opinion.

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The reference in the last settlement to the first puts it out of all question, that all the parties to the last had notice of the first; so that it is reduced merely to a question upon the operation of the first. On one side it was insisted to be a personal covenant, and that there was a remedy at law; and for that was cited *Collins v. Plummer*, 1 *P. Will.* 104, where tenant in tail, remainder over, contracted in a settlement not to suffer a recovery. The effect of that would be the descending of the estate to the issue. An attempt was made to consider that as a covenant binding in equity upon the subject-matter of the agreement. On the other side it was

Agreement concerning any subject,

though in form personal, raises a trust in equity against the party himself, volunteers, and claimants with notice under him; except where the effect would be to restore the power of violating it, as where tenant in tail has suffered a recovery contrary to his covenant.

was insisted to be a personal covenant; and it was held to be so. I confess, I think, it was impossible to apply to that case this doctrine of a Court of Equity, that, whatsoever is the agreement concerning any subject real or personal, though in form and construction purely personal and suable only at law, yet in this Court it binds the conscience. I cannot apply that to that case, because the utmost effect of it would be to restore the estate tail; and to do that by the conscientious agreement not to destroy it would leave it under the same power as before. Excluding that case, none of the rest go to establish a proposition in contradiction to this maxim, which I take to be universal, that wherever persons agree concerning any particular subject, that in a Court of Equity as against the party himself, and any claiming under him voluntarily or with notice, raises a trust. These persons have so claimed; and therefore this is a pure trust estate, and they must be declared trustees for one-third of the clear annual profits, and must account from the time of taking possession, having all just allowances (33).

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The other cases cited at the bar were *Lord Warrington v. Langham*, *Pre. Ch.* 89, *Bosvil v. Brander*, 1 *P. Will.* 458, and *Flight v. Cook*, 2 *Ves.* 619.

(33) This decree was affirmed *borough*, C. 4 *Bro. Ch. Ca.* 421. as to the principal point on a See post, Vol. III, 351. 1 *Ball.* rehearing before Lord *Lough- & Beat.* 206.

PIGOT v. BULLOCK.

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Mr. Justice BULLER, for the Lord CHANCELLOR.

May 18th.  
3 *Bro. C.C.* 539.

MR. PIGOT, tenant in fee, in 1748 devised to his wife, in case he should leave no issue, all his estate, to hold the same during her life "with full liberty to cut timber and "underwood for repairs or for her own use in fuel or other- "wise, but not to sell;" remainder to the Plaintiff for life, remainder to his children in tail. The testator died in 1751.

Tenant for life has no property in the underwood, till his estate comes into possession: In therefore cannot

have an account of what was cut wrongfully by a preceding tenant.

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In 1753 his widow married Lord *Saye and Sele*, who died in 1781. Lady *Saye and Sele* died in 1789, after having cut down and sold timber and underwood upon the estate devised to her. The testator having left no issue, the next tenant for life brought the bill against the executors of Lady *Saye and Sele* for an account of the money received by her for the underwood cut from the testator's death to the time of her second coverture, and from the expiration of that to the time of her death; but he made no claim in respect of any cut during her second coverture, as the personal representative of Lord *Saye and Sele* was not before the Court.

Mr. *Lloyd* and Mr. *Alexander*, for the Plaintiff.

This demand is opposed upon two grounds; first, the restriction from sale is considered as void: secondly, the Plaintiff is not considered to be the person entitled to the account. As to the first, the devisor was tenant in fee, and might devise upon any terms not illegal. The exception is not inconsistent with the thing granted, as it is only an exception of a particular thing, and therefore not like many cases at law, where the exception goes to the whole of the grant. As to the second, the party, who has a right to this account, must be either the Plaintiff or the first tenant in tail as first owner of the inheritance, who is not before the Court, but is the eldest son of the Plaintiff. If the underwood was now standing, being a profit of the estate, tenant for life or years impeachable for waste would have a right to cut it. The limitation to the Plaintiff is without the restriction imposed on the widow. He is in the same situation, as tenant for life without impeachment of waste is *as to timber. Since *Whitfield v. Bewit*, 2 P. Will. 240, where there is a limitation in strict settlement, remainder to another person in tail, if timber is cut by wrong or fallen by accident, the first tenant of the inheritance may bring trover. But the tenant for life and remainder-man in tail cannot by agreement cut timber; if they do, this Court will lay hold of it, and will not permit them to pocket the money, but will order it to be laid for the first person entitled to the estate; *Garth v. Cotton*, 1 Ves. 524, 546, *Williams v. The Duke of Bolton*, 3 Cox's P. Will. 268, n. Supposing the bill had been filed by this Plaintiff against Lady *Saye and Sele* and her husband

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husband for an account, according to what Lord *Hardwicke* says in *Garth v. Cotton*, that an injunction to stay waste would be granted upon a bill by the trustees to preserve contingent remainders, the Court might have given the money to him, because it is part of his estate for life, and he might have cut it if standing, and have pocketed the money. The only way of redressing this wrong is by inquiring, to whom the injury was done; and the person injured is the Plaintiff. The reason in favour of the tenant of the inheritance is, because he would be the first person entitled, if it was standing. In *Giles Bray v. Sir Paul Tracey*, 2 Cro. 688, it is said, that though in the life of tenant for life the termor by his assent might have made waste, and would not be punishable, yet after the death of tenant for life he had committed waste to the disherison of him in remainder, and then it is the same as if done after the death of the tenant for life. This though only a *dictum* is an opinion, that tenant for life without impeachment of waste has some interest in the timber.

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Solicitor General and Mr. *Mitford*, for the Defendant.

As to the first period the answer is, that this is a bill for an account of underwood cut above 30 years ago. No suit was brought against her husband; nor was the bill filed till 1790. A Court of Equity does not give an account for so stale a demand. Upon the other point the question is first, whether the interest in the underwood if cut was in any other person than *Lady Saye and Sele*; if so, secondly, whether it was in the Plaintiff. This is not like the cases alluded to of reservations nor of a devise of land with regard to the effect of passing the property in the timber. In case of reservation it is in the person, who made the reservation. If a house is given with a *direction not to let a particular room in it, unless there is a devise over or a clause of forfeiture, it is nothing more than a fruitless denotation of an intent to restrain without adopting the effectual method to impose that restraint; and therefore the privileges, which are by law attached to the estate, are enjoyed with it. This cannot operate as a condition. No estate can be qualified by a condition repugnant to the estate; *Co. Lit.* 206, b. Another reason is, that no person but the heir can take advantage of a condition; and

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his entry for that purpose would avoid every part of the devise. Every exception or reservation will be void for uncertainty. The underwood in this case is given to her for life: but there is a restriction upon her enjoyment of it. If an estate is given to a man with a direction to take a particular name, if nothing more is said, and there is no devise over, it is nugatory. So if a legacy is given with a direction not to marry a particular person, or without consent, if there is no previous condition to the enjoyment, it will not operate without a devise over. The law supposes these directions only to be used *in terrorem*, because sufficient words are not used. Suppose there was a lease with a simple declaration, that the lessee should not assign, but without a proviso of re-entry, that would not have effect though in a case of contract. The effect of this devise as to the timber is to pass the property to the person, to whom the inheritance is given. If there is tenant for life impeachable for waste, he has no property in the timber except in the use of the shade. If he is not impeachable, *Lewis Bowles's Case*, 11 Co. 79, establishes the direct contrary, to what is contended for; for if he makes use of his privilege during the enjoyment of his estate, he may; but it does not give him the property of timber cut wrongfully by a person having a prior estate to his. The Court has always said, that if a person cuts it by wrong, he, who has the inheritance, shall maintain trover, even though it is a case, in which he cannot maintain waste, as where there is an intervening estate for life, which prevents an action of waste, but does not prevent trover in respect of the property. Where it is reserved, it is in the person, who reserved it; and he has the remedy, if it is cut: where it is given, the person, to whom it is given, having the property has all the rights, such property creates. Underwood is part of the profits; and the gift carries all the profits to accrue during the estate. In this case the underwood is not given to the tenant in tail, as timber is by force of the gift. If *timber is cut wrongfully, the person, having the property before it fell, may bring trover; but not so for the underwood in this case till sold; for it is the use, after it is cut, that is restrained; and if she had applied it to any other use, she could not have been said to have done it wrongfully. If there is not a condition, for the breach of

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of which the heir at law might enter, and if this is to be considered as a profit arising in seven or fourteen years, which she must be said to have received for the heir at law, there could be no remedy for him, except an action for money had and received, or a bill in nature of that action; for trover upon the cutting would not lie.

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Reply.

As to the staleness of the demand, this is a fraud; and the Court has always said, that in cases of fraud there shall be relief against an executor; *Garth v. Cotton*, 3 *Atk.* 751. So in *P. Will.* it is said to be the course of the Court to give an account against the executor of the party, who cut timber wrongfully. If the Plaintiff is not entitled, the party who is, is an infant, and therefore in time; nor did his title accrue till her death; and a party is not obliged to take advantage of a forfeiture, till the estate comes into possession, though he may before that. Nothing is said in the answer about the length of time. The executors are trustees for charitable purposes under her will: their only care must be, that it goes to the right person; therefore if the Court thinks the Plaintiff is not entitled, the cause ought to stand over to make the son a party. Though a devise for life with condition to take no profits is bad, yet in equity there is nothing illegal or repugnant in the condition in this case. If she had avowed her intention to sell, what she was cutting, an injunction would have been granted. If there is tenant for life without impeachment of waste, and afterwards in the same instrument voluntary waste is excepted, that restriction is good. The heir can have no title; as he can only come, for what is not disposed of, and here the whole is given away.

BULLER, J.

The first point is, whether there is a ground for the distinction made for the Defendant as to the two periods, in which this underwood was cut. It is insisted for the Defendant, that it is against conscience to call upon the executor, for the value of what was cut in the first period. I do not see any thing against conscience in it; for if she took it without right, her estate was benefited by it, and therefore ought to repay. The

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Words of restraint, unless there is a provision for the consequence of violation, operate only as recommendation.

whole therefore stands upon the same ground; and the account must be, if at all, for both periods. Upon the merits there are two questions: first, whether *Lady Saye and Sele* is accountable to any one; secondly, if so, whether to the Plaintiff. The first depends upon the words of the will. From the words giving her this power it seems, as if the testator, when using them, meant not to restrain any right, she should by law have by force of her estate for life, but to give her some farther right; and as to the timber that clause does give her a farther right by directing, that she should have it, so far as she wanted it for her own use: but as to the underwood there cannot be the same construction; for she would have had a right to cut that under the general devise without an express power; but the effect was to enlarge her interest. Upon the words "*not to sell*" it must be remembered, that there is no provision as to the consequence of her selling. Therefore if it stood upon the underwood only, I do not know, how it is to be considered otherwise than as a recommendation, not as stripping her of her right. Upon this I am inclined to think, she is not accountable at all. But it is not necessary to decide that, if the second point is against the Plaintiff; and that I think is against him. It is begging the question to say, this Court would have granted an injunction against her cutting timber expressly for the purpose of sale; for this point must have been first determined; therefore it is *idem per idem*. Then suppose an estate given without impeachment of waste except voluntary waste; it would be good undoubtedly; but it is not like this; for if an estate is given for life, the addition "*without impeachment of waste*" is an addition of interest; and it may be general, or under such restriction as the testator thinks fit. But here there is an interest given, justifying the act done; and the words added certainly as to the underwood do not increase that interest. Another question is, whether the heir has a right to sue in this case. He can have no right. That part of the case has been answered by saying, that upon this will all the interest in the estate is disposed of some way or other. The only point remaining is, whether this tenant for life, not being tenant without impeachment of waste, has any property in the underwood cut, before his estate comes into possession. It is rightly assimilated to the case of tenant for

for life without impeachment of waste, supposing it only to relate to timber, and not to underwood. Upon that it is clear, that tenant for life without impeachment of waste cannot maintain trover. That was decided in the Court of King's Bench a few years ago upon a case reserved at the assizes upon the home circuit, and I think in *Kent*, which, I suppose, is not in print, or it would have been found by the Counsel. There it was determined, that notwithstanding an estate for life without impeachment of waste in being, yet timber falling or cut vested immediately in the owner of the inheritance; for tenant for life without impeachment of waste has no right to the timber cut before his possession. Then consider it as to the underwood, and without the clause "without impeachment of waste." Tenant for life has a right to cut it, if he thinks fit: if he does not, it is part of the inheritance, and goes with the rest of the estate to the remainder-man. The Plaintiff had no right, while she lived; therefore if she cut it, it should not go to him, but to the owner of the inheritance. The bill must therefore be dismissed with costs.

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Tenant for life without impeachment of waste cannot maintain trover for timber severed during a prior estate; but it vests immediately in the owner of the inheritance. Tenant for life impeachable is in the same case as to underwood.

Costs given.

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MR. STEELE, for the Plaintiff moved of course upon the authority of *Umlin v. Hudson*, 1 *Vern.* 332, that a plea of another suit depending for the same cause should be immediately referred to the Master without setting it down to be argued. Mr. *Mitford* saying, that it was according to one of the standing orders of the Court, *Lord Chancellor* granted the motion (34).

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May 19th.

3 *Bro.C.C.* 544.

Plea of another suit depending for the same cause referred to the Master of course, without being set down.

(34) Post, *Baker v. Bird*, Vol. II, 672. 2 *Ves. & Bea.* 110. The authorities are collected by Mr. *Beames: Elements of Pleas in Equity*, 134; and a precedent of such a plea is given, 330. The reference cannot be obtained by motion without a plea: *Murray v. Shadwell*, post, Vol. XVII, 353. See also *Ord. in Chan.*, Mr. *Beames's* edit. 176, 7; and his *Elem. Pl. Eq.* 134.

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**I**N *Trinity* Term, on the 15th of *June*, 1792, Lord THURLOW resigned the Great Seal; which was put into Commission; and Lord Chief Baron EYRE, Mr. Justice ASHHURST, and Mr. Justice WILSON, were appointed Lords Commissioners.

*Lord Commissioner EYRE* was sworn a Member of his Majesty's Most Honourable Privy Council.

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*June 19th, 22d.**4 Bro. C. C. 2.*

Lands purchased after a general devise passed under it; republication being implied from a codicil concerning personalty referring to the will, directed to be taken as part of it, and attested by three witnesses.

## BARNES v. CROWE.

**T**ESTATOR by will, properly executed, devised all his estates in the county of *Kent*, that he might die seized or possessed of, to trustees, upon trust to sell them, to pay his debts, and then to apply the remaining produce to various purposes. Afterwards he purchased other lands in *Kent* subject to a mortgage; and covenanted in the purchase deed to pay the mortgage-money; and gave a bond to indemnify the vendor. By a codicil, which he described to be a codicil to his last will and testament, he made some slight alterations in his will, and declared, that he ratified and confirmed it. The codicil was begun upon the last sheet of the will, and finished upon another sheet; and was executed in the presence of two witnesses. He afterwards made another codicil; which he began upon the last sheet of the first codicil, and finished upon another sheet; and which was executed in the presence of three witnesses. By the second codicil he revoked a bequest of five shillings per week given by the will to his father, and another legacy; and instead of the latter gave the legatee one moiety of two leasehold houses, and concluded thus: "In witness whereof I the said testator have to this  
" my writing contained in this and part of the preceding  
" sheet of paper, which I declare to be a farther codicil to my  
" said last will and testament, and which is to be accepted  
" and taken as part thereof, set my hand and seal; that is to  
" say, my hand at the bottom of the said preceding sheet,  
" and my hand and seal to this last sheet thereof, this 28th  
" Oct. 1788, in the presence of three witnesses."

Upon application of the mortgagee for payment the mortgage had been assigned for that purpose. There were two questions; first, whether the second codicil was a republication of the will so as to pass to the trustees the lands purchased after the date of the will; as to which the bill prayed a declaration by the Court to that effect, and that in that respect the trusts of the will should be carried into execution: secondly, supposing the will not republished, whether the heir, \*taking those lands by descent, was entitled to have them exonerated from the mortgage by the personal assets, or was to take them *cum onere*.

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*Solicitor General* and Mr. *Hall*, for the Trustees under the will.

This codicil is annexed to the will. As to the actual annexation of a codicil it was finally settled in *Attorney General v. Downing*, *Amb.* 571, that a codicil annexed, though only relating to goods and chattels, operates as a republication of a will of land. If a man seised of lands devises all his lands, and afterwards purchases more, and then makes an executor, that is not a new publication: but if he afterwards says "this shall be my will," and delivers it, that will pass the newly-purchased lands: 1 *Roll. Ab.* 618. s. 6, 7 (35). *A.* having four daughters, and being seised of twenty acres in *S.* devised all his lands in *S.* to two of the daughters, and made those two his executors. He afterwards purchased other twenty acres, which a stranger offered to buy from him; but the testator refused to sell them; and said they should go to his executors, and afterwards annexed a codicil of goods, but said nothing about land; it was adjudged to go to the executors and not in coparcenership to the four: *Dyer*, 143, *a.* The main reason was the annexation of the codicil, which was a new publication. In 2 *Eq. Ca. Ab.* 768, there is a case of *Lytton v. Lady Falkland*, which is stated in the case before Lord *Camden*. *J. S.* devised all his lands to *A.* and his heirs, and after making executors purchased the equity of redemption of lands which had been mortgaged to him in fee, before he made his will, and then he made a codicil at-

tested

(35) There is a *dubitatur* in *Roll. Ab.* to the latter branch of this proposition.

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tested by three witnesses, which he says, "I will shall be added to and make part of my last will, which I have formerly made:" Lord *Cowper* assisted by Sir *John Trevor*, Master of the Rolls, Chief Justice *Trevor*, and Mr. Justice *Tracy*, decreed this not to be a republication, but that the paper ought to be executed by three witnesses; for since the statute of Frauds there can be no devise of lands in any other way. In *Acherly v. Vernon* in the same book and *Com. Rep.* 381, and 3 *Bro. P. C.* 107, it was decreed, that signing and publishing the codicil was a republication of the will. The codicil did not appear to have been annexed to the will, but * there was an express reference in it to the devises and bequests made by the will, which amounted to a republication of the will itself. In 3 *Ch. Rep.* 177, there is the same doctrine with regard to the effect of actual annexation. In the present case the codicil is directed to be taken as part of the will.

Lord Commissioner EYRE.

Since the statute of Frauds, I think, mere annexation would hardly do, being mere matter of fact and parol. A codicil, attested by three witnesses, and having reference to the will, is not within the statute.

For the Trustees.

Jackson v. Hurlock, *Amb.* 487, relied on by Lord *Camden* in *Attorney General v. Downing*; *Potter v. Potter*, 1 *Ves.* 437; *Gibson v. Lord Montfort*, 1 *Ves.* 485, reported in *Amb.* 93, by the name of *Gibson v. Rogers*. In *Copping v. Fernyhough*, 2 *Bro. C. C.* 291, according to the note I (36) took, the late Lord Chancellor thought, the fact of actual annexation of a codicil executed by three witnesses, as being a republication or not, must depend upon this, whether it was done at the time of the execution, in which case he seemed to think, it would do without any reference in it to land; but he entertained great doubts, whether it would do if at any other time. It is proved in this case, that the testator knew, the codicil was added to the will, before the codicil was executed. The fact of annexation is material to distinguish this case, not for the purpose

(36) *The Solicitor General.*

purpose of saying that it would do alone, if all the witnesses were not capable of speaking as to the time of it. Upon these authorities the trustees think, they are entitled to have this estate purchased afterwards considered as part of the trust estate under the will.

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Upon the other point nothing is better settled, than that where there is a purchase of an equity of redemption, the mortgage debt is not the debt of the purchaser to be paid out of his personal property. It is equally well settled, that though he enters into a covenant to pay the money, that is only a collateral security, and those becoming entitled to the estate have not a right to call upon the personal estate to exonerate them. In *Shaftoe v. Shaftoe*, Hil. 1786. 2 Cox's P. Will. 664, n. devisee in tail of * lands subject to a mortgage bearing interest at 5 per cent. suffered a recovery to the use of himself in fee. Afterwards the mortgage was assigned, and the interest was reduced to 4 per cent. which with the principal the owner of the estate covenanted to pay. Afterwards it was agreed to raise the interest to 5 per cent. and he again covenanted with the mortgagees, that the estate should remain a security for the money, and that he, his executors, &c. would pay interest at that rate for it. Lord *Thurlow* determined, that it was not made his own debt, but that the land was the primary fund: and that the agreement to pay the increased interest would not do. *The Duke of Ancaster v. Mayer*, 1 Bro. Ch. Ca. 454, *Lord Tankerville v. Fawcett*, 2 Bro. Ch. Ca. 57, and *Tweddell v. Tweddell*, 2 Bro. Ch. Ca. 101, are to the same purpose.

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Mr. *Selwyn* and Mr. *Abbot*, for the Heir (37).

The second codicil, though attested by three witnesses, does not amount to a republication. The first, which is only attested by two, ratifies and confirms the will; but in the second there are no such words. This case is much stronger than the case of a codicil, attested by three witnesses, disposing of personal property only; for as it is not necessary for such a codicil

(37) The *Solicitor General* being gone, and not intending to reply, the Court desired to hear the argument for the heir before the devisees.

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codicil to have such attestation, no other motive can be assigned for it but to republish the will: but here the testator meaning to substitute the moiety of the two houses, which property he took to be real, though it is agreed on all sides to have been only personal, in the room of the revoked legacy, it became necessary in his opinion to have it executed before three witnesses for that purpose: and that distinguishes this case. If these after-purchased lands were intended to pass, it is extraordinary, that they are not mentioned. An heir at law is a favourite both in this Court and Courts of Law; and they will not disinherit him without express words or a clear intent. In *Attorney General v. Downing* the codicil was expressly held not to be a republication, because there was nothing in it shewing an intention to republish. In this case there is nothing shewing such intention, unless a mere reference is sufficient for that: but none of the cases ever went so far as to determine, that a mere reference by a codicil, attested by three witnesses, is sufficient. In **Acherly v. Vernon*, which went to the Lords, there were words of confirmation. In 1 *Ves.* 494, Lord *Hardwicke*, stating *Lytton v. Lady Falkland*, says, the annexation can make no difference, for all codicils are by law fastened to the will. In *Cholmondeley v. Cholmondeley*, cited 1 *Ves.* 489, the codicil did not pass lands purchased after the date of the will.

Lord Commissioner EYRE.

Here is internal annexation, the most powerful of all; the first codicil being written upon the last sheet of the will, and the second upon the last sheet of the first. If it stood independent of all authority, a man, who in a subsequent codicil refers to his will, and executes the codicil in the presence of three witnesses, seems by that last dated instrument to acknowledge in the presence of three witnesses, that the former instrument is his will. What more is necessary to constitute a republication of a will? If without having it in his contemplation to give it any new effect, will not that acknowledgment, that the former instrument is his will, operate as a republication?

For the Heir.

Parol declarations were before the statute a good mode of republication;

republication; but mere words would not do without intent. Though now parol will not do, yet the principle may be gathered from those cases, as well as if they were now law. Express writing is good; and perhaps the only way since the statute. A writing, appointing executors, will not do; for that makes no alteration in the will, but only points out the persons to carry it into execution. According to a manuscript note of *Copley v. Copley*, reported 1 *P. Will.* 147, but not to this point, testator purchased lands, and made a codicil, referring to the will, and directed to be taken as part of it: it was said by Sir *Joseph Jekyl*, that appointing the codicil to be part of the will was idle, as the law would have done that; and the Court decreed it to be no republication. In *Simpson v. Hornsby*, *Pre. Ch.* 439, and *Hutton v. Simpson*, 2 *Vern.* 722, a codicil, though annexed, was held to be no republication. In 1 *Ves.* 443 the *Master of the Rolls*, discussing these cases, says, it will not be sufficient. Attestation also has occurred in many cases. The only clear rule as to that is, that a codicil respecting personalty does amount to a republication of a will, as far as the will respects personalty. In *Copping v. Fernyhough* Lord *Thurlow* confines * himself to personalty, and says, he will not say so as to land. Upon the question, whether a codicil, respecting personalty alone, but attested by three witnesses, will be a republication of a will of land, Lord *Hardwicke*, 1 *Ves.* 493, says, there is very little distinction between a codicil, expressly confirming a will, and one desiring, that it may be taken as part of the will; and that this will make every codicil, executed according to the statute of Frauds, do, though it relates only to personal estate; for a codicil is undoubtedly a farther part of the will, whether it is said so, or not. But that is not an express decision upon the subject certainly. The reason of that rule is this; the Court, seeing the act done, namely, that particular mode of attestation to a codicil, which does not require it, considers that as an indication of an intention to do something, which cannot be satisfied without referring that attestation back to the will of land, and republishing it. In this case the testator's idea, that the two houses were real property, was the immediate object of his intention in using that attestation; and the question is, whether the Court will refer it to the immediate

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mediate cause or to one more remote. It is certainly doubtful; and in a doubtful case the Court will not establish the will.

Upon the other point it is true according to *Evelyn v. Evelyn*, 2 P.Will. 663, that a man taking an estate by descent with a mortgage upon it does not necessarily make it his own debt; and therefore the heir must take it *cum onere*: but this case is distinguished from most of the others, because this is the act not of the ancestor, but of the party himself, who purchased the estate subject to the mortgage, and covenanted to pay the money in the purchase deed, and to exonerate the vendor. *Shaftoe v. Shaftoe* and *Lord Tankerville v. Fawcett* were cases of devise, and therefore foreign to this question. *The Duke of Ancaster v. Mayer*, and *Tweddell v. Tweddell* were certainly cases of purchase; but it is not stated in either that the purchaser made any new assignment of the mortgage, or gave his bond so as to bind his own executors as in this case.

Mr. Mitford and Mr. Alexander, for the Devisees.

It is necessary to distinguish between cases previous to and since the statute. Since that time a republication must be by some act attested by three witnesses. But still there is an analogy in reasoning upon the subject. There is no contradiction among the cases; but all go to this; since the statute there must \* be a clear intention, that the will shall have operation at the time of the execution of the codicil in the presence of three witnesses. That shall be a republication by force of the codicil and its reference to the will. In *Jackson v. Hurlock* from a note of Mr. Emlyn Lord Northington said, that a reference to the will is the same thing as a recital of it; though that is not mentioned in *Ambler's* report of that case. A republication of a will may have different effects: if a will is revoked by any act, a codicil of republication will destroy that act. Another effect is, what we now contend for, to give an enlarged operation to general words, so as to make them pass property, acquired between the publication and republication; as enlarging, not their sense, but merely their operation. The doctrine upon the words of the statute of Wills, which is construed to enable a person to give that, which he *has*, raises a subtlety, that does not affect personalty. Here  
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the testator has given all he shall die possessed of; and therefore has in terms brought it down to the time of his death. All, that was necessary, was to say, he directs his will shall have effect; and the execution of the codicil, which he says shall be part of his will, shews, he meant that; and would be sufficient to set up a revoked will, as shewing an intent of the testator, that all his property should pass by the will notwithstanding the act done; and the difference between that case and this is only, that instead of revoking the disposition he acquired new property.

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*Lord Commissioner EYRE.*

If a man republishes a will after purchasing land, and does by any circumstance demonstrate, that he does not intend the republication to take in that land, yet it would pass, though against any intention by parol. Therefore the question is not, whether the intention was to pass these lands, but whether he has done any act, shewing he considered his will of a former date as his will of that date.

For the Devisees.

The codicil, he declares, shall be part of his will. For that one instrument must draw to it the date of the other: and we say, the codicil must draw to it the date of the will. To make this one whole it is necessary to draw the date of the will to that of the codicil. The distinction between a codicil, relating only to personal property and one disposing of real estate, is argued in \* two ways, which are contradictory; first, it is said, that a codicil relating only to personalty, but attested by three witnesses, would not amount to a republication as to real estate; and then it is insisted, that, where the codicil includes a devise of real estate, there is a reason for that sort of attestation; and therefore it is no ground for the presumption, that it was used on purpose to republish the will. Those two arguments cannot be reconciled. The distinction taken in *Roll.* is only, that where the act done is merely appointing executors, it shall not be a republication. It might be inferred, that merely saying, who shall dispose of the personal estate should not affect the real. At present that certainly could have no effect upon a will of land. In *Gibson v. Lord Montford*, Lord Hardwicke says,

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says, it is very difficult to lay weight upon the report of *Lytton v. Lady Falkland*, one reason for that determination being not law; as it is directly contrary to *Acherly v. Vernon*. It was admitted in *Gibson v. Lord Montford*, that, if there were words of confirmation, that would do. The words there were, "I desire, this writing shall be part of my will;" between which and an express confirmation, the *Chancellor* said, there was very little difference. They rely upon this passage in *Roll*; which does not amount to what ought to be an authority, particularly considered with respect to the solemnity of a codicil attested by three witnesses, as required by the statute. In the *Attorney General v. Downing*, the report of which is very short, it must be collected, that there was nothing but the attestation. Here there is, what your Lordship called internal annexation, a continuation of the writing upon different sheets, and they must be taken as one instrument, the last being published in the presence of witnesses. In the case of Sir *Thomas Chitty's* will both instruments were in the room, but not annexed, and the attestation was only to the last; yet that was good.

Lord Commissioner EYRE.

That was said to be a necessary presumption.

For the Devisees.

In *Carleton v. Griffin*, 1 Burr. 549, testator gave real and personal property by a will not attested: two years afterwards he wrote a memorandum upon the same sheet of paper, relating only to personal property, but declaring, this was not meant to disannul any of the former part, referring to the date of the will, except in one circumstance, which he mentioned. Then he *took the paper in his hand, and declared it to be his last will in the presence of three witnesses, who attested it. That passed the land. The only difference between the cases is, that in this the whole is not upon one sheet of paper.

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Lord Commissioner EYRE.

That is very strong; for the natural meaning of the words "not to disannul, &c." is to leave it, as he found it: but it went farther, to recognize it.

For the Devisees.

Upon the other point, the principle is, that where the mortgage is originally not the debt of the owner of the estate, it shall be considered still as a mortgage upon the property, and not his debt, notwithstanding any engagement entered into for payment of the money. All the cases on the subject are extremely well collected by Mr. Cox in the note to *Evelyn v. Evelyn*. No case was more argued than *Tweddell v. Tweddell*. It was originally decided the other way; but the *Solicitor General*, who was with me (38), being from illness unable to attend, the *Lord Chancellor* at my request permitted it to be argued again; and upon that argument changed his opinion. The case put by Lord *Hardwicke* in *Parsons v. Freeman*, Amb. 115, is exactly the case of *Tweddell v. Tweddell*; which differs from the present case only in this, that there was no application by the mortgagee for payment, as there is here. But *Shaftoe v. Shaftoe* is precisely in point to shew, that makes no difference. *Perkins v. Bayntun* also in Mr. Cox's note is much stronger; for the devisee made the mortgage for the greatest part (39).

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Lord Commissioner EYRE.

Has any case arisen between the heir and executor, in which the mortgagee has thought fit to resort to the executor? He may go to either. Suppose he pursues his legal right to call upon the personal estate in respect of the bond, is there any instance in which the Court has directed the heir or devisee to indemnify the executor? That would be to make the system complete.

For the Devisees.

It has been held, that the election of a creditor will not change the rights of the parties. There is the common case of simple-contract creditors coming to stand in the place of mortgagees and specialty creditors.

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Lord Commissioner EYRE.

That is another thing. I do not ask with a view to the principle. The question points to this, that, if any such case had

(38) Mr. *Mitford*. the devisee made the mortgage
(39) It turned upon an express to enable her to discharge the
recital in the mortgage deed, that debts of the deviser.

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Since the statute of Frauds annexation of a codicil to a will not admissible evidence of republication, because parol.
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had been determined, it would be evidence, that the estate is primarily liable.

If we shall be of opinion, that the will was republished, there will be no occasion to touch the other question. As to all the doctrine of annexation, which is in the *Attorney General v. Downing*, since the statute of Frauds I do not feel the weight of it. It is so out of the case, that evidence of annexation would not be received upon the subject, because it is only parol evidence of republication. I think, out of respect to the opinions of so many great men, we ought to look into the cases.

Lord Commissioner EYRE delivered the opinion of the Court.

This cause stood over, that the Court might look into the cases, and particularly *Acherly v. Vernon* and the *Attorney General v. Downing*. Upon looking into those cases the question, if it is not to be considered as determined, and so determined as that the Court can hardly consider itself at liberty now to review it, would be a question of great difficulty; for it seems to me, that these two cases are in direct opposition to each other. The latter was determined by a very able Judge in this Court, and having the former before him; which increases the difficulty: but it seems to me upon the best consideration, that the former case is so determined, and is of such authority, that every thing must yield to it. Therefore, unless it can fairly be distinguished, notwithstanding the great authority of the other the point must be considered as decided by the first. That was a case of the highest authority; as it was originally determined here by Lord *Macclesfield*; and his decree was affirmed by the House of Lords after questions put to all the Judges. In that case the codicil was held to amount to a republication of the will upon * these grounds: first, that it expressly ratified and confirmed the will; next, that it was incorporated into the will; and both, it was said, made but one will. It seems to me to be a conclusion from thence, that the publication of the codicil in the presence of three witnesses was therefore a republication of the will. The reporter states, that four cases were cited in the argument of

of that case, two of which appear to me to deserve particular attention; which are *Lytton v. Lady Falkland* and *Penphrase v. Lord Lansdown*. In the first the words of the codicil were, "I make this, which I will shall be added to and make part of my last will, which I have formerly made:" Lord *Couper* assisted by Sir *John Trevor*, Master of the Rolls, Lord Chief Justice *Trevor*, and Mr. Justice *Tracy*, decreed, that it was no republication, and argued it thus; that since the statute of Frauds there can be no devise of lands by an implied republication; for the paper, in which a devise of lands is contained, ought to be re-executed in the presence of three witnesses. This was decreed upon the 16th of *June*, 1708. The other case was in *Hilary* Term, 11 *Anne*; and a correct state of the facts of it was taken from the special verdict on the roll. It was a trial at bar. *John* Earl of *Bath*, made his will in 1684; and afterwards upon the 15th of *August* 1701 sent for seven persons; and said he sent for them to be witnesses of his will, and sometimes to be witnesses of the republication of his will. He took the codicil in one hand and the will in the other; and said, "this is my will and I publish this codicil as part thereof;" and signed the codicil, which lay upon the table with the will, in the presence of the witnesses; who subscribed it in his presence. By the codicil he referred to the will; saying, he did not intend wholly to revoke it; but devised by the codicil as follows, directing it to be taken as part of his will. He then made several devises and bequests. He put the will and codicil into a sheet of paper, and sealed them up in the presence of the witnesses; but the will was not unfolded before the witnesses; nor did they sign it, but the codicil only. These were strong circumstances to make it a republication from the manifest reference to the will, the expression, that the codicil was to be taken as part of it, and all that annexation of which so much was made in the *Attorney General v. Downing*: yet it was taken by Lord *Parker*, then Chief Justice, and the whole Court of King's Bench, that it was not a republication; as since the statute that could not be by implication, but the will must be re-executed. After this opinion upon the importunity of the Defendant a special verdict was found; and it is not said in the report, what became of it.

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Here is a rule of construction upon the statute of Frauds clearly expressed, and laid down by the first men of their time; that is, that since the statute there can be no republication by implication, that nothing short of re-execution will do. In *Acherly v. Vernon*, 10 Geo. I, it is manifest, that Lord *Macclesfield* did not adhere to the rule, he when Chief Justice laid down in *Penphrase v. Lord Lansdown*; for there was held to be a republication without re-execution, and consequently by implication. If the rule laid down by Lord *Cowper*, assisted by the *Master of the Rolls* and the *Judges*, and by Lord *Macclesfield*, assisted by the rest of the Court of *King's Bench*, when he sat there, was not sound, and if all implication is not to be rejected, and if any thing short of re-execution can be admitted, I am not surprised, that in *Gibson v. Lord Montfort* Lord *Hardwicke* was satisfied with the special ground, upon which it was argued before him, that a codicil, executed in the presence of three witnesses, might be a republication, and that he felt himself inclined, that it should. If we disentangle ourselves from the rule, that there shall be no republication without re-execution, the principle, that a codicil, attested by three witnesses, shall be a republication, seems intelligible and clear. The testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; as by the nature of it it supposes a former will, refers to it, and becomes part of it; and, being attested by three witnesses, his implied declaration and acknowledgment seems also to be attested by three. Before the statute it was no part of the essence of the obligation, that the will should be re-executed. Any thing, that expressed the testator's intention, that the will should be considered as of a subsequent date, was sufficient. Since the statute re-execution of the will is not necessary; but nothing more is required than a writing, according to the provisions of that statute, expressing that intent. Therefore Lord *Hardwicke* might well say, he saw no great difference between the words "I desire this codicil may be part of my will," and the words "I republish;" which, it was there admitted, would have done.

Codicil by its nature refers to a former will, and becomes part of it.

To republish a will re-execution not necessary, nor a particular intent to republish: intent to consider it as of a subsequent date is sufficient; which intent

in case of land must since the statute of Frauds appear in writing, according to the provisions of that statute.

done. In the *Attorney General v. Downing* Lord Camden supposed, a particular intent to republish ought to appear; and that annexation or particular expressions in the codicil would demonstrate that intention. If that was necessary, not only Lord *Hardwicke's* * opinion cannot stand, but neither can *Acherly v. Vernon*; for there was no particular intent to republish; but the testator referred to the will, made alterations, and gave sufficient demonstration, that when making and executing the codicil he considered the will as his will; and from that a republication was implied; but it was not particularly in his thoughts to do any formal act of republication. Upon considering these cases I confess, I am inclined to stand upon the general proposition stated by Lord *Hardwicke* to shew, the will in the case before us was republished. This case has auxiliary circumstances, which might seem to bring it within the *Attorney General v. Downing*; for the testator expressly declared by the original will, that he meant it to operate upon all the lands, he should die seised or possessed of. If he has not actually incorporated them together, he has inseparably annexed the codicil to the will, not by a wafer, or wrapper, or any thing *dehors* the instrument: but by what I called internal annexation, and that of such a kind that all the papers taken together may be considered as published, when the codicil was executed. But I am afraid to rely upon these circumstances for fear of entrenching upon the statute by raising evidence out of circumstances in their nature parol. The general ground is safer and better (40).

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The next question is, what will be the consequence as to this case: and here there is a doubt upon my mind. The prayer of this bill seems to go simply to ask a declaration from the Court as to this codicil being a republication for the single purpose of the Court acting upon the estate, which was acquired after publication of the will, and not to enable the Court to execute the general trusts of this will altogether. I doubt, whether that is according to the usual course (41).

The Court
will not execute a will
partially.

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(40) Post, *Meggison v. Moore*, Lord *Fingal*, XVI, 167. *Hulme* Vol. II, 630. *Crosbie v. Mac-* *v. Heygate*, 1 Mer. 285. *Rowley* *douall*, IV, 610. *Pigott v.* *v. Eyton*, 2 Mer. 128. *Waller*, VII, 98. *De Bathe v.* (41) Ante, 276.

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The Court will not take up causes by parts in that manner: and these parties not asking a general execution of the trusts of the will seem to me to have no business here. They might have tried the question of republication by ejectment at law. If the Court had been of opinion, that there was no republication, then a question of equity would have arisen. The words "*in that respect*" in the prayer of the bill mean as to that estate. As to the general prayer, perhaps we have not all parties before the Court.

For the Plaintiffs.

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It was then said, that all the parties were before the Court; and that the pleadings stated, that the heir was in possession, and *that the trustees were carrying the trusts into execution, but were prevented by this question.

Lord Commissioner EYRE.

Then declare the will well proved, and the trusts to be carried into execution with the usual directions; and that the codicil is a republication of the will, and that the after-purchased lands shall pass, and that all parties shall have their costs: and reserve the consideration as to the surplus of the real and personal, and subsequent costs.

Lord Commissioner WILSON.

Doe v. Davy, Cowp. 158, was a case pretty much of this sort: there was nothing but the words "ratify and confirm the will," and the instruments were joined by a wafer; and it was held to be a republication.

Mr. *Mitford* said, he should have mentioned that case, but thought, it might have been objected to, as it was a devise of copyhold lands, which are not within the statute of Frauds.

EARL OF UXBRIDGE v. BAYLY.

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June 25th
and 26th.

4 Bro. C.C. 13.

SIR NICHOLAS BAYLY, being seised in right of his wife

Lady *Caroline Bayly* of an undivided third part of two manors and premises, and having made no provision for younger children, by indenture of 17th April, 1753, settled those undivided third parts to the use of himself for life, remainder to Lady *Caroline* for life, remainder to trustees to preserve contingent remainders, remainder to all and every or any of the children of them, other than an eldest or only son, in such shares as Sir *Nicholas* and Lady *Caroline* should appoint by deed or writing, in default of appointment as the survivor should appoint, in default of such appointment to all, &c. other than an eldest or only son, in tail, as tenants in common, with cross remainders in * tail, and in default of such issue to Sir *Nicholas* and Lady *Caroline* in fee. By this settlement four powers were reserved: first, a power to Sir *Nicholas* and Lady *Caroline* jointly by deed or writing to charge these undivided third parts or any part thereof with any sum not exceeding 3000*l.* with interest at 5 *per cent.* for such persons and purpose as they should think fit, or to raise that sum by mortgage upon a term for years, to be void, or to attend the inheritance, when such sum should be paid: secondly, a farther power to Sir *Nicholas* alone by deed or writing to charge these undivided third parts with any sum not exceeding 2000*l.* over and above the 3000*l.* under the first power with interest at 5 *per cent.* for such persons and purpose as she should think fit, or to raise that sum by mortgage in the same manner. The third power was to the survivor of Sir *Nicholas* and Lady *Caroline* to charge in the same manner with such sum, as should, together with what should

Three powers by settlement, first to husband and wife jointly to raise and appoint 3000*l.* secondly to husband alone to raise and appoint 2000*l.* thirdly, to survivor to raise and appoint such sum [*500]^{as would} with the sum before raised make 5000*l.* The wife joining in raising 3000*l.* under the joint power for the husband, he covenanted not to charge by the power reserved to him alone or any other power whatsoever during her life, and so long as

said 3000*l.* should remain unpaid, without her consent. After her death he by deed-poll did charge with 2000*l.* more, to be paid to his executors for debts, &c. and otherwise in performance of his will, or as he should appoint by it; and died, leaving his second wife executrix, without taking notice by his will of the charge: but the deed-poll was found uncanceled among his papers: the 2000*l.* well charged, and went to the executrix without a special appointment.

Charge well created by settlement, though for a volunteer, not revoked by general revocation of the uses under a power for the mere purpose of partition of joint estate, and re-settling to the same uses the separate part to be taken on partition.

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have been before raised under the other powers, amount in the whole to 5000*l.* to be disposed of as the survivor should think fit. The fourth was to Sir *Nicholas* and Lady *Caroline* and the survivor by deed or writing to revoke all the uses before limited of the said undivided third parts, and to limit them to trustees in fee in trust to convey with the consent of Sir *Nicholas* and Lady *Caroline*, or the survivor, either in exchange for other lands, or for the purpose of sale, and to settle the lands to be had in exchange to the same uses. Soon after making this settlement Sir *Nicholas*, having occasion for the sum of 3000*l.*, prevailed upon Lady *Caroline* to join him in raising that sum; and the first plan proposed for that purpose was, that he should raise 2000*l.* under his sole power, and that she should join him in raising the other 1000*l.* under the joint power. This plan however was relinquished; and it was agreed, that the whole should be raised under the joint power; and *Dayrell* advancing the money, the said undivided third parts were accordingly mortgaged to him under the joint power for 500 years; and upon *July* 1, 1743, by indorsement upon the deed of settlement of the preceding *April*, reciting, that for the more speedy and easy raising the sum of 3000*l.* Lady *Caroline* had agreed to join Sir *Nicholas* in the execution of their joint power, he covenanted with the trustees, that he would not “ during her life and so long “ as the said 3000*l.* shall remain due, owing, and unpaid, “ charge the said third parts and premises or any part “ thereof, with any sum whatsoever by the power reserved to “ \*him alone by the within written indenture or any other “ power or authority whatsoever without the consent and “ concurrence of the said *Caroline Bayly* to be signified by “ writing under her hand and seal first had and obtained for “ that purpose.” In *February* 1766 Lady *Bayly* died, leaving issue Lord *Uxbridge* and several others. On 6th *March*, 1767, Sir *Nicholas* by deed poll, reciting the indenture of *April* 1753, and his power to charge the said undivided third parts with 2000*l.* did charge them with that sum, with interest at 5 *per cent.* to be paid to his executors, and applied to the payment of his debts, legacies, and funeral expences, and otherwise in performance of his will, or as he should by his will direct and appoint. In *January*, 1779, in pursuance of an agreement with the owners of the other undivided third parts of these

estates

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estates for a partition Sir *Nicholas Bayly* by deed covenanted, that he and Lady *Bayly* had not during her life created any charge except the mortgage to *Dayrell*, and that since her death he had made no appointment of the premises; and he revoked the several uses, and limited the premises to trustees in fee for the purpose of making partition; and then by lease and release of 25th and 26th *January*, 1779, to which *Dayrell* was a party, the partition was made. The effect of that was, that the two manors were conveyed, subject only to the mortgage to *Dayrell*, to such of the uses of the settlement of 1753 as were then capable of taking effect; and other specific parts of the premises were conveyed to the other owners in lieu of their respective third parts. Sir *Nicholas*, having married again, made his will in 1781; and appointed his wife sole executrix and residuary legatee. After his death the deed poll was found among his papers uncanceled; but no notice was taken of it either by the partition deeds or the will; nor did it appear to have been ever out of his custody, nor that he had communicated it to any person. When this deed was discovered, the children of Sir *Nicholas* and Lady *Caroline Bayly*, who were entitled under the settlement of 1753 and the deed of partition to the lands allotted as the share of Lady *Caroline*, were in treaty with Sir *Gilbert Heathcote* for the sale of those estates; and it was stipulated, that the money due to *Dayrell* should be discharged out of the purchase-money. On discovery of the deed of 1767 the executrix claiming the 2000*l.* charged by it, the purchaser refused to pay the whole purchase-money without having the premises discharged from that sum; upon which by agreement 2500*l.* was laid out in \*stock to indemnify him against that claim; and the bill was brought to have the deed poll of 1767 declared void and delivered up, and that Lady *Bayly* should be decreed to release all her interest under it, upon the ground that Sir *Nicholas* had no right to execute it, or if it was originally good, that it had been revoked, and was not intended to be an effectual charge.

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*Solicitor General*, Mr. *Lloyd*, and Mr. *Hollist*, for the Plaintiffs.

Upon the first point, Sir *Nicholas Bayly* had no power, while the 3000*l.* remained a charge, to make any other. Upon the

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the effect of the powers it is clear, he could not charge beyond 2000*l.* without the consent of Lady *Bayly*. Their motives, as expressed in the instrument, for changing the mode of raising the 3000*l.* shew, they did not intend, it should be attended with consequences different from those of the plan first proposed, as far as it was to affect those, who were to take the estate afterwards. The purpose was undoubtedly the same. His agreement in consideration of her joining him in raising that sum is expressed in his covenants; first, that which was to protect the younger children against any farther act, and secondly, that to the trustees upon the partition, that he had not done any thing, by which those third parts would be charged, other than as before recited, viz. the mortgage to *Dayrell*. The true construction is, that he neither would during her life create any other charge without her consent, nor after her death so long as the 3000*l.* should remain a charge. If that had been paid off, perhaps he might then have been at liberty to charge with 2000*l.* She was a purchaser for her younger children of his power in consideration of giving up 1000*l.* to him.

Upon the second point, he must have meant, either that this deed should not operate at all, or that it should only if the 3000*l.* should be paid off in his life. It was always in his own custody. He could cancel it at any time, or say whether it should have effect by being delivered out of his custody. Twelve years after the execution of it by deed under his hand and seal he either declares, that it shall have no effect, or does that, which is tantamount to an effectual revocation; for having never delivered it out of his custody, when making the partition he recites, what valid acts he had done, and expressly says, that he and she had not in her life made any charge except the mortgage to *Dayrell*, and *that since her death he had not made any appointment of the premises; though certainly he does not there use the word “*charge*.” He lived three years after that; and it does not appear, that he ever communicated the deed-poll to any one; and there are sufficient assets without that sum.

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Mr. *Hollist* also argued, that the Court might in this case

as in many others (42) substitute the word “or” for “and” in his covenant not to make any other charge without her consent during her life *and* so long, &c.

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*Lord Commissioner EYRE.*

The real question is, whether she was a purchaser of his chance of surviving her, and surviving her having a power to appoint to the extent of 5000*l.* in the whole. The true reason for changing the mode of raising the 3000*l.* was, I suppose, that the mortgagee chose to have it under one power rather than under two.

*Attorney General, Mr. Mitford, and Mr. Fonblanque, for the Defendant.*

*Lady Caroline Bayly* was not a purchaser for 1000*l.* of his power of charging 2000*l.* Under the settlement she had an estate for life after his death. It is material to consider the words thought to restrain him from the exercise of that power after her death. The words requiring her consent could have no reference to the time subsequent to that event. Upon their construction the words “*during her life*” must be expunged. Those words control all the subsequent part. The substitution of “or” for “and” is a very material alteration. From her life estate after his death it was natural for her to say, that if he desired to raise that sum in that particular way for his convenience, it was fair on her part to see, that the income of the estate should not be diminished, if by surviving him she should become entitled to the rents and profits during her life. She therefore had an interest in keeping up those rents, which readily accounts for the introduction of the expression “*during her life.*” Then how can the words be changed? In all cases of that kind the thing must be in such a situation, that the Court is forced to make that construction. In this it will introduce an ambiguity. The argument for Plaintiffs

(42) In wills these words are 390. *Jackson v. Jackson*, 1 Ves. substituted for each other, to 217. Post, *Maberly v. Strobe*, afford a reasonable construction; Vol. III, 450, and the references in the note, p. 452. *Bell Richardson v. Spraag*, 1 P. Will. 434. *Read v. Snell*, 2 Atk. 642. *v. Phyn*, VII, 453, and the references p. 458, n. *Framlingham v. Brand*, 3 Atk.

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Plaintiffs is absurd. According to their construction he might pay off the 3000*l.* and immediately charge with 5000*l.* but if he does not pay off that sum, he cannot charge with any thing. If he had raised the money according to the first plan, he might after her death have raised 2000*l.* more. The Plaintiffs could not recover at law upon this covenant, because they were not parties to it; and equity will not interfere, where a breach of covenant does not give an action.

Lord Commissioner EYRE.

Is there any case of a covenant with the trustees for parties insisting upon an agreement in equity, in which the Court has said, that, because no action would lie for them, therefore the Court would not enforce it? This covenant is with the trustees for her and the children; for they are trustees for the general purposes of the settlement.

For the Defendant.

The covenant here was with a particular view to protect the interest of Lady *Bayly*, not those behind. As to his intention or consciousness that he had no power to do this, this charge by the terms of the deed was not to have operation till his death; but was a matter, upon which his will was to operate; which accounts for its being found among his papers. If he had died without a will this charge could not have existed, perhaps not if he had not appointed an executor. As to his having sufficient assets without that, the words make it a part of his will; and a gift to a residuary legatee or making an executor is a sufficient appointment. The circumstance of its being found uncanceled, when it was to have operation, must over-rule any silence in that respect. The direction to pay to his executors would alone make it fully a part of his personal estate: but he proceeds to declare the trust for the very purpose, for which executors always take the personal, viz. for debts, &c. or in such manner as by his will he should appoint; that is, if he chose to make a specific disposition of it, he might. Those words do nothing more, than the law would, if he had simply directed it to be paid to his executors. Upon the whole he stripped himself of this power only during the life of the first Lady *Bayly*; and therefore it belongs to the second as his residuary legatee.

Solicitor General, in reply.

What is given to the executrix as executrix, is for the purposes of the will; I lay out of the case therefore any question upon that. The first question is, whether she became a purchaser, and for the children as well as herself, of the non exercise of this power, so that he could not, though she died, charge this 2000*l.* because the 3000*l.* remained a charge. If that is decided against the Plaintiffs, another question arises: viz. whether, when the deed of partition of 1779 is attended to with all its effects, it was not an extinguishment of the charge of 2000*l.* though well created. If the Defendant is right upon the first point, he could have again charged after the extinguishment with 2000*l.*; and if he could, it is according to the true intent gone; for had he meant to give it operation, he could have revived it immediately after, and did not. It was competent to him to enter into an agreement with his wife for valuable consideration to restrain himself from the exercise of the vested power, and also of the contingent power which might vest in him. The argument is not absurd or ridiculous; for by no act of his own could he raise more than 2000*l.* then where is the folly of supposing, that she consented to enable him to raise 1000*l.* upon the terms of his giving up those two powers? The difficulty of the argument is in permitting him to raise 5000*l.* in the one case, and not permitting him to raise 2000*l.* in the other. I do not construe "*and*" to mean "*or*": but I say, the sense is, that he will not during her life, *and* while the 3000*l.* remains a charge, create any other. The restraint as to any other power could mean nothing but the contingent power. The deed of revocation expressly revokes all the uses limited, except expressly the mortgage to *Dayrell*; then did he revoke not this charge, which he had made for his own benefit, by which he would have disencumbered the title, and might have immediately exercised his power as to the 2000*l.*? It was natural and necessary, that *Dayrell* should be a party to the partition; for his term over-rode the whole; and no person would have trusted to the argument, that the power of revocation would include his estate; and it is not likely, that he would join, unless he was to have a mortgage of part of the estate when divided. I do not admit, that the will does in any way revive

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revive the charge; for it contains nothing relating to this particular part of his property, but is only a disposition of his personal as his personal. If it is gone, it has never been revived, and is then to be considered as if never executed.

Lord Commissioner EYRE.

All the points insisted upon at the opening have been argued not with much confidence. But a new point has arisen, as to which, if seriously insisted on, we should wish to hear more. If this was a charge for a purchaser for valuable consideration, I take it for granted, the circumstances belonging to this partition deed would not have been sufficient to revoke that charge: but the charge being voluntary, I suppose, it is meant, that he ought to have taken care when revoking the deed, under which that charge existed, that a provision should have been made for that, or that he should have substituted a new charge. Are there cases, in which it has been held, that if a man makes a voluntary charge under a power, which gives him authority, and then revokes the uses for the mere purpose of a partition, such a charge is revoked? If it stands upon mere principle, I know how to deal with it.

Mr. Mitford.

Either this instrument does not operate at all to revoke the charge, or if it does, it must operate to substitute the estate taken upon the partition for the same purposes; for it revokes the uses of the settlement of 1753; if by that it revokes this appointment, to do so the deeds of 1753 and 1767 must be taken for this purpose as the same instrument.

Lord Commissioner EYRE.

Their way of arguing it is, that the uses of that settlement were revoked, and afterwards revived; but that those, who meant to act upon them, must act upon them revived; and that the former charge by the old power would not operate, but there must be a new one.

Solicitor General.

Where a man conveys an estate, upon which there is a charge

charge for his own benefit, he can never set up that against his grantee.

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Lord Commissioner EYRE.

The difficulty is, that it is a mere voluntary charge, which the party himself put into that predicament, and to which he might have put an end by making another charge. At present I am against it, I confess.

Lord Commissioner ASHHURST.

As this depends entirely upon technical reasoning, there ought to be some cases to support it.

Lord Commissioner EYRE.

We will give our opinion now upon the principal point; and if it is thought, that any thing can be made of the other, it may be set down for a rehearing.

I had no doubt, from the moment either of these powers was distinctly understood, that the true merits of this case upon the first question lay in very narrow compass, and that they are distinctly and clearly against the Plaintiffs; for here are three distinct powers; one, by which Sir *Nicholas* and Lady *Bayly* might join in the appointment of 3000*l.*; another, by which he was to appoint 2000*l.* at his own will and pleasure by a separate act; a third, by which the survivor of them might appoint such sum, as together with what was before appointed under the other two, would make up 5000*l.* This being their situation, he in 1753 soon after his marriage had occasion for 3000*l.* and the first idea was to execute the separate power, and that she should join him in executing the joint power to the amount of 1000*l.* There was a convenience as to the mortgage in its being by the execution of one power rather than of two; and therefore, the original object having been distinctly stated, namely, to raise 3000*l.* in that way first proposed, they agreed to raise it under the joint power; but that was to be considered, as between them, as in truth what the original plan was, namely, an execution of the separate power as to 2000*l.* and of the joint as to 1000*l.* It is true, as has been said for the Plaintiff, that if she had driven a very hard bargain, she might have refused to consent to raise this sum,

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sum, unless he would abandon his contingent interest under the third power in case of his surviving her; but I should require, that so unequal a bargain should be expressed in the clearest terms. Instead of that the language according to the plain and grammatical import is directly the contrary. They were in such a situation, that he might also have exercised his separate power; therefore care was to be taken to confine him as to that, the third power not having arisen, and that while the circumstances remained the same, he should not exercise it. But upon her death the third power arose; and therefore his right to make a farther charge to the amount of 2000*l.* arose. How it is in form, is another thing; the substance is, that at her death he had a right to raise 2000*l.* more. Therefore this provision suspended his right till that event, or another event, which made part of the condition, and was necessarily connected with it, and not to be separated from it by substituting the word "*or*" for "*and*". Suppose this charge had been paid in her life, there would be no reason, why he should not execute his separate power; but before her death it was already executed by what was done. This is as plain upon the true construction of these instruments and their sense, that it is the clearest case, I ever saw.

Then comes this other point; which has a more formidable appearance; as it is not so intelligible. How far his conduct upon the partition shall be understood to be a revocation of the charge, is a question of more difficulty. Doubtless the uses were revoked; and the power, under which this charge was made; but the revocation was under a power, given by the settlement, the true object of which was not to destroy any of the uses, but to shift them with all their consequences to the new estates, to be purchased in consequence of the revocation; it being merely for the purpose of selling the estates and buying others to the same uses, or for the purpose of a partition, but without any intention to make any serious alteration in these uses. That being so, to maintain in equity, that such revocation, made in acquiring a separate estate in the land instead of an undivided third, shall have the effect of destroying every thing, which was originally rightly performed under the original settlement, would be to disappoint the general purpose of that original settlement; and

and being so, it does require some strong rule, founded upon a series of authorities, which on account of other cases it would be dangerous to disturb. If there is no such rule, considering the meaning of the original deed, and of the subsequent deed, having that sole operation to convert the undivided third into separate property, and to lay all the charges which were upon the undivided third upon that, which was to be taken in the room of it, I think, the uses and the powers under them ought to attach themselves to the newly acquired estate, exactly as they stood upon the original estate, without any alteration in the interest of any. And then I think, there is no question behind; the question as to the effect of the appointment being to the executors, and the custody remaining in the party, and the will containing no particular appointment of the benefit of this charge, appearing to be abandoned; so as to leave the case upon the two questions, of which I have taken notice. Therefore the ground, upon which the Plaintiffs come here, is misunderstood. They have no ground to come here; and therefore the bill must be dismissed.

Lord Commissioner ASHHURST.

Sir *Nicholas Bayly* could not borrow this sum by his own power; therefore he had recourse to Lady *Bayly*: and she agreed as the shorter method to join him, for which he entered into stipulations. No doubt at the time she made this concession, she had a right to make a provision for the interests of her children: but this does not appear upon the whole to have been in her contemplation at the time, but that her life-interest, if she should survive him, should not be prejudiced by his acts; and therefore she made him stipulate, that he would not during her life, and so long as that sum due upon mortgage should remain unpaid, charge these third parts with any sum by the power reserved to him alone or any other power without her consent. This provision by her was to prevent her part, if she should survive him, and the estate should thereby come into her hands, from being charged with any other sum: but it was never understood between them to extend in the event of his surviving her to prevent any greater charge to the extent of the original power. The manifest construction

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Act, done under power in a deed, is as if incorporated in the deed, when executed.

construction is, that that was the object in their contemplation. If so, it follows, that he had power upon her death to raise 2000*l.* for any purpose; and he did so by a deed, which remained in his custody. Nothing arises upon that; because, as he never meant it to take effect till after his death, there was no occasion to put it into other custody. Then the remaining question is, whether the state of things is altered by any thing, that has happened since. I think not, if that charge was once well made. As to the parties to that deed of 1779, all, that was in contemplation at *the time, was, that there should be such parties to it, as were necessary to effectuate the intention; namely, all who had any legal interest; therefore *Dayrell* was a necessary party, for he had the legal estate in him. But as to this, it was only an equitable charge; therefore it was not necessary to join in respect of it to effectuate the legal purpose in their contemplation. By that these estates were conveyed to the trustees accordingly; and then the new estates were limited to the same uses, to which the undivided third part was limited by the original settlement. The word "*charge*" to be sure is not used; but the word "*use*" is. Whenever parties have power by deed to do a particular act, when done under the power, it is as if incorporated in the original deed when executed; therefore I do not see, when the second limitation is to the same uses as the original deed, that this may not be properly termed a use; for it is an interest growing out of the original power; and it is harsh to hold it revoked, when the revocation was only for the purpose of making a division of the estate, and the part taken upon the division was conveyed to the same uses, as were the object of the original settlement. To say, it is a revocation of any act done upon the undivided estates, seems to be a doctrine very nice and technical; and I am not willing to consider it so, unless tied down by decided cases. As none have been mentioned, it is too subtle a doctrine for me. Therefore I think, the deed of partition was not a revocation of any charge legally imposed prior to that. As to the argument that this money was only given for debts, legacies, and funeral expences, without saying more, there is an executrix appointed; and she, particularly as she was his wife, is entitled to what results.

Lord Commissioner WILSON.

As to the first point, it was reasonable, that, what was a sole power, should under these circumstances become a joint power. If the money had been raised, as was at first proposed, then the power of raising 2000*l.* more, while both were living, must have had their joint consent. Then, when she died, there was an end of that covenant. She had good reason for desiring to restrain him from the exercise of any other power during her life on account of her estate for life, and her contingent power. It was immaterial after her death, because he would then have had the same sum by the contingent power. It is then said, that under the circumstances he did not intend, that this instrument * should have any operation. The arguments urged for that seem to have been in a great measure all abandoned except the last. From the nature of this deed it must have continued in his power; and there was no occasion to refer to it by his will; for he made an executrix, and that declared, the executrix was to have it. Next as to the deed of partition, whether that proves his intent to revoke this instrument. The general intent was simply to change the nature of the property. That as to the other parties, with whom he was dealing, was the only intent. These Plaintiffs are none of those people. In these instruments there is no intimation of an intent to vary the circumstances, in which the property then was, in any other respect than by changing it to separate property; therefore there can be no implied intent to revoke it. Then it must be upon some rule of law, if at all. It may be said, the present claimant of this sum is a volunteer, and therefore shall not come into equity to have it made good: but this is the case of a Plaintiff coming to set aside a deed, not of a volunteer coming to establish it. Equity will not set it aside, where no intention of the party to do so appears, merely because some rule of law revoked it at law. This money in conscience belongs to her, upon the supposition that he did not intend to revoke this gift, because it was his intention to give her the money without question; if it had not been for this deed of partition, it would have been given; and if that imports no more than that single thing, she is still entitled to it.

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 Costs refused.

The decree dismissed so much of the bill, as sought to have the deed-poll declared void or fraudulent, and to have it delivered up, or to oblige the Defendant to release her interest under it; but without costs; and declared the 2000*l.* to be well charged by it.

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July 6th.

BINFORD v. BAWDEN.

Wife examined on commission apart from husband as to the disposition of money devised to be laid out in land for her in tail, reversion to her in fee, whether to be received in money or laid out as directed.

MONEY was devised to be laid out in land for a *fême covert* in tail with reversion to her in fee. For the Plaintiff it was prayed, as according to the usual course of the Court in these cases, that she should be examined by commission, apart from her husband, as to her inclination with regard to the disposition of the money; and that, if chose to take it in money, it should be paid to her.

Lord Commissioner EYRE.

It is clear, the Court would do it in case of a person *sui juris* (43). It is equally clear, they would refuse it in case of an

(43) See post, *Pearson v. Lane*, Lord Cowper, unless by consent Vol. XVII, 101. *Benson v.* of him in remainder, as in *Benson*, *Short v. Wood*, *Chaplin* *Trafford v. Boehm*, the money *v. Horner*, 1 *P. Will.* 131, 470, was not paid to the tenant in 483. *Edwards v. Countess of* tail, but was laid out; the *Warwick*, 2 *P. Will.* 173. *Traf-* tenant in tail in that instance *ford v. Boehm*, 3 *Atk.* 440. having died without suffering a 1 *Ves.* 176. 2 *Bro. C. C.* 160. recovery. This was altered Lord King refused it in *Eyre's* by the statute 39 & 40 *Geo. III.* *Case*, 3 *P. Will.* 13, and in c. 56, authorising the Court on *Onslow's Case*, cited there (*n.*); petition to order money, in saying, a fine required time; and trust to be laid out in land to be he did not see, why the issue settled, to be paid to the per- should not be regarded as well son, who, as tenant in tail of as a remainder-man. Where the land, could bar the remain- there is a remainder over after der by a recovery. In executing an estate tail in money to be that statute the Court takes care, laid out in land, since *Colwall v.* that time sufficient for suffering *Shadwell*, mentioned 1 *P. Will.* a recovery shall have elapsed; 471, 485, and 1 *Ves.* 176, before qualifying an order, made in Va- cation,

an infant (44). I want to know, whether there is any case shewing what the Court does in the case of a *fême covert*.

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Mr. *Mitford* said, there was no case expressly deciding the point; but that in *Cunningham v. Moody*, 1 *Ves.* 174 (45), Lord *Hardwicke* says, she must come into Court to consent or be examined upon commission.

Lord Commissioner EYRE.

Declare, that she is entitled to this sum in the pleadings mentioned; and let a commission be awarded to examine her separate and apart from her husband touching the disposition of the said sum, whether she will have it laid out in land, or receive it in money; and reserve all farther directions; because it will then be necessary, if she elects to take it in money, to inquire whether she has a settlement (46).

cation, with the condition, that *Ex parte Hodges*, VI, 116, 156,
the tenant in tail shall be living 576. *Ex parte Frith*, VIII, 609.
on the second day of the ensuing *Baynes v. Baynes*, IX, 462.
Term; ascertains, that the title 3 *Ves. & Bea.* 11.
and the fund are clear; and (44) *Seeley v. Jago*, 1 *P. Will.*
requires a petition by each 389.
party: post, *Lowton v. Lowton*, (45) *Oldham v. Hughes*, 2 *Atk.*
Vol. V, 12, n. *Ex parte Bennet* 452. 3 *Atk.* 448.
and *Dolman*, *Ex parte Sterne*, (46) *Post*, Vol. II, 38.

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July 7th.

A BILL of foreclosure was dismissed with costs, so far as it sought to tack a bond to a mortgage against creditors.

Bond not to be tacked to a mortgage against creditors.
Costs given.

Mr. *Lloyd*, for the Plaintiff, did not argue it; and said, it was determined by Lord *Thurlow*, *Lowthian v. Hasel*, 3 *Bro. C. C.* 162.

Lord Commissioner EYRE said, it was a clear settled principle, that against creditors it could not be tacked (47).

(47) *Jackson v. Langford*, 2 *Ves.* 662. See post, Vol. II, 372, in *Jones v. Smith*. *Adams v. Claxton*, VI, 226. *Ex parte Knott*, XI, 609.

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MASTER v. FULLER.

4 Bro. C. C. 19.

Agreement by wife without knowledge of husband to pay additional rent out of her separate property good.

FULLER let a house to *Master* at the rent of 20*l.* *per annum*. After the death of Mrs. *Master* her husband filed the bill, charging that by a secret agreement between *Fuller* and her she had paid him 18*l.* *per annum* more in respect of the house out of her separate property, which was not discovered till after her death, and praying that the Defendant should refund, what he had received in respect of it, and deliver up the agreement. There was no charge of imposition upon the wife.

For the Plaintiff

It was insisted, that this was a fraud on the husband; for though he had no power over this property, yet he might rely upon it so far as to have a reasonable expectation of the benefit of it, if he behaved well to his wife; and if he had known of this agreement, perhaps he would not have taken the lease. It was compared to the case of marriage brocage, &c. where the security, if founded upon fraud against a third person, is void; though there can be no injury to the person, who comes * to complain of it, being a party. *Rednan v. Redman* and *Gale v. Lindo*, 1 *Vern.* 348, 475, and *Neville v. Wilkinson*, 2 *Bro. C. C.* 543, were cited.

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Costs given.

The bill was dismissed with costs without hearing the Defendant (48).

(48) As to the absolute power of a married woman over her separate property, see *Fettiplace v. Gorges*, ante, 46.

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June 22d, 23d
July 6th, 10th.

4Bro. C. C. 21.

Tenant in tail
of a rent-
charge under
settlement, be-
ing also devi-
see in strict
settlement of
the estate
charged with
it, put to elec-
tion.

Tenant for life
let into posses-
sion on con-
sent and giving
security to pay
charges pay-
able out of
rents and pro-
fits, and to
keep down in-
terest of the
fund to an-
swer contin-
gent charges.

IN 1761 Sir *Patrick Blake*, a minor, being about to marry, an order was made, referring it to the Master to consider, whether it was not fit, that an application should be made to Parliament to enable him to make a settlement of part of his estate upon the eldest son of the intended marriage. Upon a report that such application would be proper, an Act of Parliament was obtained. In consequence of that, in 1762 a settlement was made, reciting the order, report, and Act of Parliament; and by that settlement Sir *Patrick Blake* for the considerations therein mentioned, and for making a provision for the eldest son, granted to trustees and their heirs a clear rent-charge of 2000*l. per annum* upon his estate in the island of *St. Christopher's*, payable half-yearly out of all and singular the lands, tenements, messuages, hereditaments, plantations, negroes, coppers, mills, and all other utensils whatsoever, in trust for the first son of the intended marriage in tail male, remainder to the second and other sons in the same manner, remainder to himself in fee, with power to distrain; the first payment to be made upon the *Michaelmas*-day next after the death of Sir *Patrick Blake*. To secure this rent-charge a term of 2000 years was vested in other trustees upon trust to permit Sir *Patrick Blake* to receive the rents. There was a proviso, that the rent-charge should cease, if Sir *Patrick Blake* should settle lands of equal value in *Great Britain* upon the persons, to whom it was limited. By this settlement there was also a charge of 20,000*l.* for the younger children after the death of their mother. That sum was invested in stock; which was afterwards sold; and the money lent to Sir *Patrick Blake* upon mortgage of his estate in *Suffolk*. There were also provisions for the jointure of the intended wife, and for some other purposes; but they were not material otherwise than as opposed to the argument, that the object of this settlement was to make a provision for the eldest son. In 1784 Sir *Patrick Blake* devised all his real estates in *St. Christopher's* and *Great Britain* to trustees in fee upon trust, as soon as conveniently might be after his decease, to convey those estates for a term of 500 years, and, subject to that term,

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to the use of his eldest son in strict settlement, remainder in the same manner to his second and other sons, and to his daughters, successively, with other remainders over, the last to his own right heirs; with directions, that all persons, who were to take, should take the name of *Blake*. The trusts of the term were, that the trustees should with the rents and profits, or by sale or mortgage of all or part, or by such other ways and means as they should think proper, raise so much as together with the personal estate therein mentioned should pay certain annuities and legacies, some of which were contingent; and upon farther trust out of the growing rents and profits to pay certain other bequests. Besides the usual powers of leasing a power was given to all the tenants for life in succession to settle upon any wife by way of jointure a sum not exceeding 1500*l.* *per annum*, and to raise 15,000*l.* for younger children. There was a direction to the trustees during the minority of such of his said sons as should be entitled to the freehold of his said estates, to pay out of the rents and profits any sum not exceeding 800*l.* *per annum* for the maintenance and education of such son and sons respectively; and that all the surplus of the said rents, issues, profits, and produce, should be made to accumulate for answering the purposes of the will. He gave all the negroes, stock, and personal property, in *St. Christopher's* upon the same trusts, or as near as the law of the island and the nature of the property would admit. He then gave all his real and personal estate in the island of *Montserrat* to his eldest son in fee, subject to a term of 500 years in trust out of the rents and profits, or by sale or mortgage, to raise 7000*l.* for his second son *James Henry Blake* at 21, but to sink into the estate upon his death under that age. He also gave his house in *Portland-place* to his eldest son: but if he should not choose to live in it, the trustees were directed to let it, and pay him the rent; and he made his eldest son residuary legatee: “ and I
“ do hereby ratify and confirm the settlement, whereby my
“ younger children *James Henry Blake* and *Annabella* my
“ * daughter by my former wife are entitled to 20,000*l.* in equal
“ portions, so far as the same relates to my said children.”

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The original bill was brought by Sir *Patrick Blake*, the eldest son of the testator, as devisee. The cause came on for
farther

farther directions upon the report of the Master, stating the accounts, and upon a supplemental bill, occasioned by the subsequent discovery of the rent-charge under the settlement; by which was introduced the principal question, whether the Plaintiff must elect to take the rent-charge under the settlement, or the estates under the will.

The other question was, whether he should be let into possession upon giving security to pay the sums payable out of the growing rents and profits, which were inconsiderable, and to keep down the interest of the fund to answer the contingent legacies (49). It appeared from the report, that there was a deficiency of personal property, but that the charges upon the estate were very inconsiderable in respect of its value.

Solicitor General and *Mr. Graham*, for the Plaintiff.

As to the election, it is a clear maxim in this Court, that where a party takes a benefit under a will, and claims by a paramount title any interest whatsoever, of which that will otherwise disposes, he must not disturb the disposition of the will; or must make good the deficiency, he occasions. But it must always appear by express words, or by necessary implication from the inconsistency of the two interests, that the testator means to dispose of that subject, to which the party lays claim by paramount title; *Noys v. Mordaunt*, 2 Vern. 581. *Streatfield v. Streatfield*, Forr. 176. In the latter case Lord *Talbot* states the principle; that, where the testator does an act, by which he asserts an ownership, or disposes clearly, there the party is put to his election. This is not that sort of case; for it is clear, there are no words disposing of this particular interest, claimed by the Plaintiff paramount the will; nor can the general words pass it. A general disposition of all rents and profits would not pass this annuity; for the meaning must be taken to be those rents and profits, to which he was entitled. By the very same * instrument there was an annuity to the wife and other charges, which he certainly did not mean to touch. If the Plaintiff may be kept out of possession, which will be pressed, that

(49) The *Lord Chancellor* refused to let him into possession before the accounts were taken: ante, 194.

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that is strong to shew, no election was intended. The only circumstances for raising election are the provision in the will for maintenance, and the confirmation of the settlement as to the provision for the younger children, contained in it. Perhaps it is enough to say as to the first, that it might naturally have escaped the testator, that this annuity was to take place immediately after his death: he might have concluded, it was not to commence till 21. As to the partial confirmation of the settlement it is too much to say, that therefore he meant to disaffirm it as to the rest. It is decisive, that he had it in contemplation; and then the circumstance of not disaffirming it is strong to shew, he did not mean to extinguish it. But there is a peculiar reason for the difference; for, as the daughter was put into the intail next to the sons, and as he had given her a large legacy, those dispositions would undoubtedly have been a satisfaction; and it must be supposed, that he made his will with the best advice. There are three cases in *Ambler*, in which a widow was compelled to elect to take either her dower, or an annuity charged upon the estate of her husband by his will; viz. *Arnold v. Kempstead*, 466; *Villareal v. Lord Galway*, 682; and *Jones v. Collier*, 730 (50); but *Foster v. Cook*, 3 Bro. C. C. 347, is a case directly contrary to these; for Lord *Thurlow* there thought, there was no inconsistency in her taking both the annuity and dower: his words are “from the testator’s having given all he has I am to collect, that he has given what he has not:” and that case was much argued, and all the authorities were cited (51).

Upon the second point, on the face of the will this term is not to be so paramount to all the limitations as to extend down to the last payment to the annuitants under age: if it is, the Plaintiff may be kept, as he has been ever since his father’s death; which could not be the intention. It is in the nature of a security only according to the usual purpose in interposing a term for younger children, &c.; but it was not intended, that the trustees should really be in possession. That would defeat

(50) *Wake v. Wake*, ante, 335. the claims must be inconsistent.
3 Bro. C. C. 255. Post, *French v. Davies*, Vol. II,

(51) To compel her to elect 572. *Strahan v. Sutton*, III, 240.

feat the other provisions of the will. The Plaintiff has no power to make a jointure or a provision for younger children, till he is in possession; and he is married: nor can he let a lease; though it is admitted, he must have the estate some time or other. The fair way of considering it is to look to the purpose intended to be effected, namely, what would be most convenient for the purposes of the will and the enjoyment of his son. Some of the charges are directed to come exclusively out of the rents and profits, and particularly the maintenance; which is perfectly consonant to the idea, that they might be applied in that way till his son should be of age. But with regard to the ulterior and heavy charges he gave a latitude to the trustees; which undoubtedly belongs to the Court; who may do it either by sale or mortgage, or under the words "by other ways and means, &c." may appoint a receiver or consignee to give security to keep sufficient in his hands to answer these charges. He must have meant, that his son should take at 21; which is the age he has appointed for some of the legacies to be paid. If he pays the legacies payable out of the rents and profits, which are very small, and undertakes to keep down the interest of the fund, which may constitute future legacies, and liberty is given, if he does not keep down that interest, to apply for a receiver, that brings it to the ordinary case, in which the Court will not keep a person out of possession.

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The Counsel for the younger children, who were to take in remainder under the will, not being instructed to argue the case for them, the Court expressed a wish to have it argued for them; and it stood over for that purpose.

June 23d.

Mr. *Mansfield*, and Mr. *Preston*, for the younger children.

July 6th.

The estates under the will were the only provision intended for the eldest son by the testator; who had no conception, that he was to be tenant in tail of this rent issuing out of the principal estate, of which rent he might suffer a recovery, and make it a perpetual burthen upon this very estate, which was settled by the will. The testator did to a certain extent recollect the settlement: but whether he did or did not, the Plaintiff cannot have


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have both; as it is apparent, that he was not intended to have more than what was given him by the will. *Noys v. Mor-daunt, Streatfield v. Streatfield*, and the cases from *Ambler*, establish this; that a person, taking under a will, must assent to the whole, and not say the part, which is in his favour, shall prevail, \* and that, which is against him, shall be defeated. It is improbable, that with such a peculiar view of settling this estate the testator meant to continue this charge upon it, and, meaning that, took no notice of it in his will; particularly as he expressly confirmed another part of the settlement. He would have confirmed it as to this rent-charge also, if he intended that to remain. The term of 500 years, which is the first limitation in the will, is to take effect immediately on the death of the testator, and for immediate purposes, namely, to pay annuities and legacies. How is it possible to reconcile that with the supposition of a term of 2000 years, under which the legal estate was standing out in trustees of that term under the settlement? The first tenant for life according to that construction will have a right to charge to the amount of 3500*l.* *per annum*, viz. 2000*l.* in respect of the annuity, and 1500*l.* for jointure. What necessity was there to give him a power to jointure and to raise 15,000*l.* for younger children, if he was to have the rent-charge in tail, of which he might make himself tenant in fee, and provide for them out of it? Those powers belong equally to every tenant for life in succession; yet every other tenant for life will be in a very different situation from the first, if that charge is to continue. Then is it possible, that he could give 800*l.* *per annum*, to be paid out of that estate he was so anxiously settling and preserving in his family for the maintenance of one, who immediately upon his death was to be in possession of 2000*l.* *per annum*? When immediately after giving that he directed the surplus of the rents and profits to accumulate, did he forget, that 2000*l.* *per annum* of those rents could not accumulate? They cannot be so applied, if they are to accumulate; and that excludes the argument, or rather the verbal quibble, which is always used in these cases; as where in the cases upon dower the testator devises *his estate* to trustees, it is said "*his estate*" is only, what remains after dower is satisfied; and therefore he does not mean to give the whole estate including dower: but here that

that is excluded, because it is expressly limited to trustees for 500 years, and it is expressly said, how 800*l. per annum* of the rents is to be applied; and that is not in payment of this rent-charge. Some argument, though slighter, arises from the gift of the *Montserrat* estate. He meant to perpetuate the estate in *St. Christopher's*. If he supposed this rent-charge to exist, he would, instead of giving the *Montserrat* estate absolutely, have burthened with this charge that estate, which he did not think of consequence enough to \* be settled. The point as to dower was with difficulty got over in this Court on account of the rule of law, that there could be no compensation for dower, which occasioned very strong cases, in which this Court refused to bar the wife of dower. The first was *Lawrence v. Lawrence*, 2 *Vern.* 365, 1 *Eq. Ca. Ab.* 218, in which the House of Lords adopted the opinion of Lord Keeper *Wright*; who differed from Lord *Somers*. In that they proceeded upon the ground, not of misapplication of the principle by the latter, but that there was not enough in the will to infer an intention, that the wife should not have both. *Foster v. Cook* did not shake the preceding cases; nor was it argued: but the *Lord Chancellor* decided in favour of the widow simply upon this; that he did not think, there was any thing upon the face of the will, from which he could collect an intention, that the widow should not have her dower. It was an amicable cause, and decided without argument. Upon looking over that will there is considerable reason to think, that the testator could not mean her to have her dower; though the *Lord Chancellor* thought it very clear. The testator gave all his real and personal estates upon trust. It is not likely, that he meant, she should have a third of what he gave to the trustees by the word "*all*." However the decision did not go to overturn the other cases; but upon this only, that there was not enough in the will to deprive her of her dower. In *Warren v. Warren*, 1 *Bro. C. C.* 305, the judgment turned upon circumstances applying strongly in this case; the testator having given 2000*l.* each to his younger children, and a provision for maintenance. This settlement by Sir *Patrick Blake* was only substituted for a future settlement, to be made, when he should be of age.

Upon the other point the devisees in remainder have no objection to let the Plaintiff into possession.

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*Solicitor General*, in reply.

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The principle, upon which the Court acts, is clear; that any person has the power of disposing of the property of another person, if he chooses to propose a case of election. From *Noy v. Mordaunt*, and perhaps earlier, it has been clear, that where a person manifests an intention to dispose of the property of his devisee, the latter cannot take under the will, and also disappoint it. However this case of election must not depend upon mere conjecture; but there must be in the language of the will either declaration plain, or a manifest intent to propose \*election. It is like the cases of execution of powers by will; in which the testator need not recite the power; but must name the subject, over which he has power; and shew by declaration plain or manifest intention, that he does mean to execute. Those cases are analogous to these; for these are cases, in which there is an exercise of power over another person's property. The interests of the parties under this settlement are extremely singular. Its professed object is to make a provision for the eldest son; but it is remarkable, if that was the intent of the settlement, that it should go so much farther; giving remainders to the second and other sons; therefore it is a case of election with reference to them, if to the first. Its professed object therefore will not weigh much. If this is sufficient to put him to election, why would it not, if he was a mortgagee? Could it be said that in case, that the testator meant to extinguish the mortgage? If not in case of a mortgage, why in case of a rent-charge? *Prima facie* the expression "*all my real estate*" does not imply a rent-charge more than a mortgage, or a rent-charge belonging to any other person than the devisee; though I agree, it is more probable, that, where the devise is to the person having such interest, it is meant to include that interest, than where it is to a stranger. But it is not of itself sufficient to destroy the interest in the devisee. The maintenance is for the eldest son for the time being, and is not 800*l. per ann.* absolutely, but such sum not, exceeding that, as the trustees shall think necessary; therefore if the eldest son has the property, the trustees must be governed by that. An intention to keep together the estate at *St. Christopher's* does not appear. If that was the intent, why give in fee the *Montserrat* estate, which was fully

fully sufficient for his education; and why throw the legacies and all the other charges upon the estate at *St. Christopher's*, and lay only that single charge of 7000*l.* upon the other? As to the confirmation of part of the settlement, that is an answer to the argument, that he forgot having made the settlement. The inference from a partial confirmation is but conjecture at best: but in this instance there is good reason for it. The doctrine of the Court in cases of satisfaction is, that, where there are provisions for younger children out of estates settled upon the eldest son and family, the Court says, the father is a purchaser for the family, and, though the provisions for the younger children do not square in little circumstances, infers, that the father intends a satisfaction, where that is for the benefit of the eldest son, the heir of the family. That is the \* whole effect of *Warren v. Warren*; which is a case of satisfaction, not of election. The portions for the younger children are not to arise till after the death of their mother; therefore he may be supposed to say, he gives this immediate provision; and does not mean to prejudice that, they would take at her death. It assumes the question to say, that, as the surplus of the rents is to accumulate, this annuity must therefore be included. Perhaps the testator would have said, the Plaintiff should not have both: but that is not enough to induce the Court to destroy a clear legal interest, out of which a man is not to be spelt and conjectured. In *Andrews v. Emmot*, 2 Bro. C. C. 297, Lord Kenyon, then Master of the Rolls, thought, he could not look *dehors* the will; and that the words “ *my personal estate*” were not sufficient to pass property, over which the testator had a power of disposition (52); and the Lord Chancellor was of the same opinion, and thought, that the words “ *my real estate*” or “ *my personal estate*” will not pass property, over which the testator has a power of disposition; though an attempt to dispose of it would have made it assets. A good account of most of the cases upon dower in *Ambler* may be found in 1 Bro. C. C. the note 292, to *Pearson v. Pearson*. Upon that case with great submission to the opinion of Lord Loughborough I say, that the value of the estate could not be proved *dehors* the will. In *Pitt v. Snowden*, before Lord Hardwicke,

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(52) *Holmes v. Coghill*, post, Vol. VIII, 499.



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wicke, notwithstanding the annuity was given out of freehold messuages described, with a clause of entry and distress, and the freehold was given, subject to the annuity to the very woman, who was to have dower, yet both passed. In *Arnold v. Kempstead* Lord *Northington* did go against that decision; and was followed by Lord *Camden* in *Villareal v. Lord Galway*: but in *Foster v. Cook*, Lord *Thurlow* differs from them; and follows Lord *Hardwicke*. It was once the law in this country, that a man could not dispose of a given portion of his personal property from his wife; and now in *Scotland* the wife has one-third of the personal property. Could it be said, that the husband, because he gave all his personal estate, meant to bar that without express declaration? The principle of the Court is said to be, to make a liberal construction of wills: but it is acting against the testator, instead of for him, to pick out of loose sayings what he might have clearly expressed, if he pleased. Lord *Camden's* assertion in *Ambler*, 683, that the trustees by allowing the claim of dower would not be in possession of the whole, takes *the question for granted; and the reasons there do not prove the claims inconsistent.

Lord Commissioner EYRE.

The materials for the decision are to be collected from the will itself; the principle being established by the cases; but in respect of the great value of the question, and the importance to the parties, and the broken manner, in which it has been brought forward, we will take a little time to consider of the decision.

July 10th.

Lord Commissioner EYRE, after stating the case delivered the opinion of the Court.

The question is, whether the Plaintiff is entitled to the rent-charge under the settlement, and also to the estate subject to it, and the other benefits under the will, or whether he must make his election. It is the settled doctrine of a Court of
 Devisee cannot disappoint the will, even if it disposes of his property; but must either convey according to the devise or renounce the benefit of it *pro tanto*: so if he is an incumbrancer upon estate directed by the will to go free from incumbrance, he must elect: but the intent must appear by declaration plain or necessary inference.

of Equity, and agreed on all sides, that no man shall be allowed to disappoint a will, under which he takes a benefit. To put the strongest instance at once, if a man takes upon himself to devise to *B.* lands, to which he has no colour of title, and which are in the possession, or are the inheritance, of *A.* to whom some part of the testator's estate, real or personal, is also devised, *A.* must either renounce to the extent of his own estate (53) the estate devised, or must convey his own


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(53) The language here used, and that of Lord *Alvanley* and Lord Chief Justice *DeGrey*, post, Vol. II, 372, 560, led to the conclusion in the note, XIII, 171, that the principle of election seems to be compensation; not forfeiture, as in the case of express condition. It is singular, that a distinction, so clearly resulting from the different language, in which this doctrine is stated, (see post, Vol. III, 385) has not been noticed in any other instance until the late cases, *Tibbits v. Tibbits* and *Green v. Green*, post, XIX, 656, 665. 2 *Mer.* 86; when the general question, being distinctly raised, appeared to the *Lord Chancellor* involved in so much doubt as to require a search of precedents; and the consideration the subject then received has produced no farther decision than that a party, claiming under a marriage settlement, and also by a paramount title under a prior intail, must make good the whole contract; and therefore, electing to take by his prior title, must relinquish the whole of his interest under the settlement: the principle of compensation not ap-

plying to such a case. Where a case of election arises on a will, it is still open to observe, that, if in one state of circumstances, the testator meaning to dispose of the property, or affect the title, of another, and aware of his want of direct power, may be supposed to intend a condition, which intending he would naturally express, and even where, as in *Noys v. Mordaunt*, in certain cases condition is expressed, the implication of such a condition, to the extent of forfeiture, from the mere fact of a disposition, proceeding entirely upon mistake and ignorance of his want of title, is certainly a strong operation of a Court of Equity, and in cases, that may be imagined, most improbable and extravagant. Mr. *Swanston*, in a very comprehensive and able note, 1 *Swanst.* 433, *Gretton v. Howard*, collecting several authorities, concludes, that the principle and limit of this equitable jurisdiction are compensation; that the authorities have not gone farther in decision; and the *dicta* were not intended, to the extent in which they appear, to support the principle of forfeiture.

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own estate to *B*. It is but a modification of the same case, where a man has subjected his estate to special limitations or incumbrances, and by his will makes a new disposition of the same estate free and discharged from the incumbrances, or under different limitations; the incumbrancers, deriving other interests under the will, if they will take by it, must not disappoint it; but must permit the estate to go in the new channel, and as free from incumbrances as the testator intended. Therefore as to the argument from the supposition, that this had been a mortgage instead of a rent-charge, if it was so, and the estate had been disposed of by the testator free from the mortgage, the case would be the same, only in different words; for a mortgage comes under the head of incumbrance. This putting a devisee to his election, however reasonable and just it may be, was certainly a strong operation of a Court of Equity; and I agree, the intent of the testator to dispose of that, which is not his, ought to appear upon the will, [*524] *with such explanation however of the *prima facie* appearance as the law admits; and that it ought to appear by declaration plain or necessary conclusion from the circumstances; and no man ought under pretence of this rule to be spelt or conjectured out of his property. But as on one hand we are not to do it by conjecture, so on the other we are not to refuse our assent to that moral certainty and demonstration, which in such cases as the present the general object of both instruments, the nature of the subject, the scope and purview of the will, the observations upon the particular clauses, and the force of the expressions, construed according to their natural import, may produce. With these few observations I proceed to examine these two instruments. The rent-charge was a branch of a family settlement in contemplation of marriage, by which

feiture. Since the above observations were written, the case of *Tibbitts v. Tibbitts* has been decided as a case for compensation only; leaving the general question still open: 1 *Jac.* 317. In 2 *P. Will.* 418, *Deg v. Deg*, under a devise for payment of debts a creditor, insisting on his title by

a settlement to part of the lands, was admitted to the benefit of the devise as to the residue; and in *Williams v. Kidney*, post, Vol. XII, 136, also it was determined, that the doctrine of election is not applicable against creditors.

which a provision was made, not only for the eldest son, but also for a jointure for the intended wife and portions for younger children. This rent-charge in particular was a provision for the eldest son. Upon the face of this settlement that is to be considered in two views; not simply as a mere incumbrance upon the estate to that extent, but as a part of the general plan for the preservation of the family (to use the language of the order and report). The provisions of the will are with the same view. Each had its separate operation; but both were parts of one object; viz. a general settlement of this property, being the very same property, upon his son and those collateral branches of the family, with an anxiety for the preservation of the family manifested by the requisition, that his daughter and her issue should take his name. In this respect they are in *pari materia*; and there is demonstration plain, that he had the settlement before him, when making the will. He expressly refers to it, when making an addition to the provision for the second son; therefore, I think, I am not at liberty to act materially upon so remote a conjecture, as that he remembered that part, and forgot so material a part as this, relating to the eldest, granting so large an incumbrance upon the most valuable part of his property. The will purports to be a disposition of his whole estate in *St. Christopher's* with the stock on the plantations; and operates as a disposition of the whole; for, admitting the rent-charge to be a subsisting incumbrance, it is neither a particular estate, like dower, nor does it take the estate out of the testator, as a mortgage might do. Therefore he meant to devise the whole estate; and did so. The argument therefore, that he is to be presumed only to • dispose of so much as the rent-charge left, fails; for the whole was in him; and he meant to pass the whole. Nor does the argument, drawn from the cases of powers not executed, apply; for such an interest before possession is not the personal estate of the party (54); nor will it pass under the description of personal estate simply, nor, without other demonstration of a particular intent, by words in themselves

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An interest under a power of disposition is not before execution the estate of the party; and will not pass by general words: nor are they

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(54) *Holmes v. Coghill*, post, Vol. VIII, 499; XII, 206.

alone sufficient to dispose free from incumbrance.

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unapt to pass it. If there is an incumbrance upon the estate devised in such terms, the mere language of the will affords no inference of an intention to dispose of the estate freed from that incumbrance. That goes no farther than, comprehending the whole, to pass it, if there is nothing *dehors* the will. Upon the other hand no particular intent to pass less than the whole appears. The truth is, incumbrances, being paramount to the intention, prevail by their own proper force without regard to the intention. At present therefore we have advanced no farther than to establish, that he did intend to settle the whole by his will. The will purports, that the term of 500 years shall commence immediately and for immediate purposes. It purports farther to appropriate to its own purposes the whole rents and profits. Here it begins to be inconsistent with the settlement, which had appropriated the rents to the purpose of raising 2000*l.* *per annum* for the eldest son. The law may control the will in this: but certainly the will aims at disposing of the whole: and this seems to throw upon the Plaintiff the *onus probandi*, that the testator did not mean to dispose of the whole, but only of what was left. For that we must look *dehors* the will; for on the face of the will it appears, he meant to dispose of the whole. If the Plaintiff fails in his proof of that, the argument might safely be rested here. The testator has made a disposition of the whole fund, out of which the rent-charge is to come; therefore the person entitled to that, and taking a benefit under the will, must submit to the dispositions of the will. But let us see, if no particular intent to make another provision for those claiming under the settlement instead of that appears. It is clear, the testator meant to make a provision by his will for his eldest son, and those, who might stand in his place. Courts of Equity lean against double portions (55), not in favour of the eldest son, but for the family, and to preserve the estate in as ample a condition as the provisions will admit for the benefit of all claiming under the limitations of the estate. The nature of the incumbrances in the will, as well those which are certain as those contingent, without looking out of the will for some, very heavy, appearing on the report, shew, it is utterly improbable,

Courts of Equity lean against double portions, not in favour of the eldest son, but of all to take under the limitations.

(55) Ante, *Ellison v. Cookson*, 100; and see the notes in page 112, 259.

improbable, that he meant the will to be cumulative. The estate was to go under the burthen of what was imposed beyond the rent-charge. If he meant to substitute the provisions under the will in the room of that under the settlement, his eldest son would want maintenance; if the will is to be cumulative, he would not want it. But maintenance is given; whence in my opinion the presumption is violent, that he considered himself as having substituted a provision unproductive of maintenance for his eldest son in the room of one, that would have produced it. This is strengthened by the observations arising upon that part of the will, which is cumulative for the second son. Though it was supposed in the argument, that he had not maintenance, it appears by the report, that the 20,000*l.* in the 3 *per cents.* was sold out, I suppose after the divorce which took place; and was lent to Sir *Patrick Blake* upon a mortgage of his *Suffolk* estate, which bore interest; and was made a trust for the younger children. The provisions for the second son being cumulative, and the former provision producing maintenance, he anxiously provides, that the cumulative provision should not produce maintenance; for it was not to bear interest till to be raised. No good reason can be assigned for his silence as to the rest of the settlement. But it is not, because the will is not so perfect, as it ought to be, that the natural construction should be repelled. If no good reason can be assigned, there is no use in searching for bad reasons. He might think, he was giving his son a better thing, but also a thing which included what he would be entitled to under the settlement. If he supposed, it would produce more than the rent-charge, it was natural for him to think, it was a better thing; and though we know his situation as tenant for life of the one, and in tail of the other, of which he might suffer a recovery, was very different, perhaps the testator thought, it would descend in the same manner as the estate in strict settlement. Whether he reasoned so, or forgot the settlement, or how it was, is of very little consequence upon this question. He has made a disposition manifestly inconsistent with the settlement. There is strong evidence of a particular intent to make provisions by his will to the full extent of the words used. Having the settlement before him he must be taken to be

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be cognizant of it. But all that is nothing to the argument. If the will is inconsistent with the settlement, the Plaintiff is by the rule of the Court put to his election. I avoid going into cases upon circumstances not occurring here. Whether the cases upon dower have been well or ill decided is nothing to this case. Tenancy in dower is an estate in land different from the other estate in the land. There testators disposed of their own estates; and that estate was not theirs. There the words did not *ex vi terminorum* pass the estate in dower. The particular intent, that it should, was to be made out; and here it is, that those, who have decided those cases, have seemed to differ; for, no two cases being precisely the same in circumstance, it can hardly be said, they did differ. Our judgment is founded upon the rule and the application of it: which, if wrong, cannot be demonstrated to be so by book cases. This must go only upon the comparison of the instruments. Our opinion is, that the Plaintiff must make his election (56).

The Plaintiff, immediately electing to take under the will, was decreed to convey the rent-charge to the uses of the will: and was ordered to give security, to be approved by the Master, and upon so doing to be let into possession.

(56) In addition to the references ante, 523, see, on the general subject of election, *Burtricke v. Brodhurst*, *Baugh v. Read*, *Stratton v. Best*, *Forsight v. Grant*, *Wake v. Wake*, ante, 171, 257, 285, 298, 335. Post, *Finch v. Finch*, 534, 561. *Whistler v. Webster*, Vol. II, 367, *Lady Cavan v. Pulteney*, II, 544; III, 384. *Wright v. Rutter*, *Wilson v. Lord John Townsend*, II, 673, 693. *Rutter v. Maclean*, *Ward v. Baugh*, IV, 531, 623. *Wollen v. Tanner*, *Long v. Long*, *Yate v. Moseley*, *Blount v. Bestland*, V, 218, 445, 480, 515. *Sheddon v. Goodrich*, VIII, 481. *Rich v. Cockell*, IX, 369. *Kidney v. Coussmaker*, XII, 136. *Judd v. Pratt*, *Thellusson v. Woodford*, XIII, 168, 209; XV, 380. 1 *Dow*, 249. *Dashwood v. Peyton*, XVIII, 27. *Brodie v. Barry*, 2 *Ves. & Bea.* 127. As to the customary heir, claiming copyhold, not surrendered, and the distinction of the heir at law, claiming against a devise, void by infancy, or under the statute of Frauds, see post, *Pettiward v. Prescott*, *Blunt v. Clitherow*, Vol. X, 589, and the note page 591. *Dilke v. Parker*, 1 *Sicanst.* 359, and Mr. Swanton's notes.

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July 12th.

4 Bro. C. C. 28.

THE Defendants entered into an agreement for the purchase of two houses from the Plaintiff to the following effect; they were to pay 431*l.* 10*s.* : 200*l.* at that time, and the remainder at *Michaelmas*, with interest at 5 *per cent.* and the houses being unoccupied, they were to be let into immediate possession: but if the balance should not be paid at *Michaelmas*, they agreed to pay “in lieu of interest upon the same a clear “rent of 42*l.* *per annum*,” out of which the Plaintiff was to permit interest at the rate of 5 *per cent.* in respect of the sum first paid to him to be deducted. The first payment of 200*l.* was duly made; and possession was given. The bill was for * a specific performance of this agreement, which was resisted on the foundation of usury. Lord *Kenyon* when Master of the Rolls decreed for the Plaintiff, from which decision the Defendants appealed.

Agreement by *A.* to purchase houses from *B.* for 431*l.* 10*s.* possession to be given, and 200*l.* paid immediately, the rest with interest at *Michaelmas*; but if not then paid, *A.* to pay “in lieu of interest upon the same a clear rent of “42*l.* *per annum*,” out of which was to be deducted interest for the 200*l.* paid: not usurious.

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Mr. *Mansfield* and Mr. *Richards*, for the Defendants,

Contended, that this was an usurious contract; for the purchase was complete; and the argument therefore was to give more than legal interest; and it was expressly stated in the agreement to be in lieu of interest for the forbearance of that part of the debt, which, it was agreed, should be paid at *Michaelmas*,

Solicitor General, Mr. *Mitford*, and Mr. *Hollist*, for the Plaintiff.

The agreement is in substance only this; suppose previously to any contract respecting the sale of these houses the Defendants had been tenants of them at 42*l.* *per annum*, and they had applied to the Plaintiff in order to purchase them, and he had said, he would sell them for a certain sum, part to be paid immediately, part at *Michaelmas*; if the latter sum is paid at *Michaelmas*, there is an end of the matter; if not, then that they should continue his tenants, and that he would discount to them out of the rent of 42*l.* *per annum* the interest of the money, he had received under the first part of the agreement: that would not be usurious, being only an agreement that they should continue tenants, till they chose to

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to become purchasers. The fact is, the houses were at the moment untenanted: but the Defendants, wishing for immediate possession, had it; and were then in nature of tenants. Whether they were to become purchasers or not, depended upon this, whether he could make a good title; so the effect was only, that he would let it to them at 42*l. per annum*, and that they should purchase it on those terms, if they pleased. Where the party has an election to put an end to the affair, it is not usurious; 1 *Hawk. P. C.* 532. *Cro. Jac.* 509. Here if the Defendants pay the money at the day, they cease to be tenants, and become purchasers. They need not continue tenants longer, than they choose to be so. *Floyer v. Edwards, Cowp.* 112, is not to be distinguished from this case. This is not a contract for a loan; nor was there an agreement for forbearance of money for an hour; nor any obligation but for damages for not performing the contract. If a \* man propose to sell an estate for 50,000*l.* if to be paid next *January*, but for 70,000*l.* if not to be paid till *January*, 1794, the statute contains nothing against that; and if so, instead of adding 20,000*l.* to the price he might say, the purchaser should pay him 500*l.* for that year. The interest here is part of the price of the estate, not a satisfaction for delay of payment. This differs considerably from a case of loan; for being a contract for the purchase of houses, it is impossible, that the vendor could have brought an action for the remainder of the purchase-money, unless an actual conveyance was executed; and if not, then he could have only brought an action for damages for not performing the contract, but not for a certain sum. *The King v. Drury, 2 Lev.* 7, is a case of actual loan, which yet was not held to be usurious. The non-payment of the money at *Michaelmas* would not be a breach of the agreement; for by the terms of it in that case there was a new agreement. These provisions are merely terms, upon which the party agrees to sell the estate. Suppose the agreement had been, that he would take 431*l.* 10*s.* if paid at *Michaelmas*; if not, that the price should be 600*l.* that would not be usurious.

*Lord Commissioner EYRE.*

Certainly not. *The King v. Drury* is not applicable. The ground of the determination was, that he, who paid the rent,  
 was

was not bound to pay the principal sum, upon which the supposed usury was calculated; therefore it was no loan, nor forbearance of interest upon it.

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If there was an agreement to give more than 5 *per cent.* for the forbearance of money, it is usurious; and it is immaterial how it arose. Cases of an option to get rid of the payment of interest by paying money upon a certain day have no relation to this case. Here the Defendants became purchasers of these houses, and the Plaintiff seller. The agreement and the obligation upon the Defendant to pay the whole purchase-money were complete. The moment it was executed, the Defendants had no option whether to pay the purchase-money and interest or not. It became completely the money of the seller. If the word "rent" was left out, it would be expressly a sum of money, greater than the law allows in lieu of interest. The moment *Michaelmas*-day was past, an action would have lain against \* these Defendants for 231*l.* 10*s.* and they were in the situation of every debtor. The Plaintiff might have brought an action of debt, only that is not now usually brought for simple-contract debts upon *assumpsit*. The declaration would be upon the agreement, though it might be in general terms for houses sold.

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*Lord Commissioner EYRE.*

Must he not prove title and conveyance? Is this a debt so constituted, that you need not shew upon the part of the Plaintiff, that the purchase was actually completed? Would the mere agreement be proof, that the houses were sold?

Reply.

The Defendants would be obliged to pay the money, unless they could shew fault in the Plaintiff. They must defray the expence of the conveyance. The Plaintiff in the action need only prove the agreement, and that he sent an abstract to enable them to get a conveyance; and they could not answer, that no conveyance was actually executed. If the Plaintiff had done all, that was necessary for him to do, it was a clear debt; and then he might have declared for houses bargained and sold.

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*Lord Commissioner EYRE.*

Goods are sold by contract accompanied with delivery;  
houses by contract accompanied with conveyance.

Reply.

There are frequent instances of declarations for goods bargained and sold, without saying delivered, where there is no complete delivery: as if the goods were burnt, and there is a question, whether the loss shall fall upon the buyer or the seller; so where the party will not take away his goods.

*Lord Commissioner ASHHURST.*

Conveyance or  
delivery neces-  
sary to support  
general *inde-  
bitatus assump-  
sit.*

To support *indebitatus assumpsit* you must say goods sold and delivered. We have sometimes seen such declarations, as you speak of, *ex abundanti*; but no man would ever rest his cause without a special case upon the contract of bargain.

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Reply.

Where the purchase is complete, the goods delivered or houses sold, the price stipulated, part of it paid, and the rest to be paid on a certain day with legal interest, can a contract be sustained to convert that into a different bargain, giving more than legal interest? Where the security is by note or receipt, the obligation to pay is immediate, if the lender chooses to insist upon it. Such note reserving usurious interest would be illegal, though the interest was not a satisfaction for forbearance for a certain time, as in the case of a bond payable at a future day. The question is, whether a vendor can exact a greater rate of interest than 5 *per cent.* after the time of payment. That is the same, as if it was for forbearance and lending of money. If not, the statute of usury would be entirely evaded.

*Lord Commissioner EYRE.*

The language of this agreement gave it strongly the appearance of usury: but when we come to define usury, and consider the nature and spirit of the agreement, those first impressions perhaps are not strong enough to support the case

Usury is taking more than the law allows  
made for the Defendants. Usury is taking more than the law allows  
upon a loan, or for forbearance of a debt.

allows upon a loan, or, as I read it, for forbearance of a debt. Therefore it is first necessary to see, whether there is a debt constituted here, upon which there can be the forbearance, that is necessary to make this usurious; as to which I am at present inclined to think, there is no debt here; but the whole matter rests upon an executory agreement, depending for the execution of it upon many things, which may never take effect; and therefore this sum of 231*l.* 10*s.* may never be a debt; for I do not agree, that after *Michaelmas* an action of debt would have lain for this: it must have been upon the special agreement; and must have stated, either that the purchase was completed, or that the party had done every thing in his power to complete it, and to entitle himself to the money. I incline therefore to think, the usury fails upon that ground. But that is a narrow ground. This is a contract for the title, and in the nature of it for ready money in effect with regard to the title. 200*l.* was to be paid down; the other sum at *Michaelmas* with 5 *per cent.* which is nearly the same thing as ready money. Possession would have followed; but till completion of the title it was a fair \* subject of contemplation between the parties. Immediate possession was delivered upon the faith of the remainder of the money being paid at the time: but in the event of its not being so paid, there seems to have been a new idea in their minds as to this business, that from that time the bargain for the title was to be considered so far suspended, as that it was to revert to the vendor; that with regard to the money received it was to be considered as a deposit in his hands to be accounted for with interest, till the rest should be paid; and he was landlord, and was to receive the rent as such, till that took place. If that was the true nature of the agreement, upon the merits there is nothing usurious; for if he turned himself into a sort of debtor as to the 200*l.* paid, paying interest till the rest should be paid, he must be considered in justice and equity entitled to the interest in the estate, till conveyed out of him; which puts him into the situation of landlord; and then he might receive a rent, till he became seller by receiving the money and conveying the title. If this is the true nature of the case, the language ought not to tie it down; and I think, this is the true nature of it, and that it was so considered by all the parties. That appears  
upon

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upon the evidence. Then as to the rest, in executory agreements there is more room for the construction as to the true nature of the bargain, than if there had been an actual conveyance with this stipulation as to the money not being paid at the time limited; for then possession would have been part of the thing conveyed, and it would have been difficult to understand the Plaintiff to resume it so as to entitle himself to the rent. But it was not conveyed; and therefore there is a way open to construe this to be free from usury; and I am glad to do so under the circumstances of bringing this before the Court. I am of opinion, the decree ought to be affirmed.

*Lord Commissioner ASHHURST.*

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My first impressions have been altered by the arguments and the facts of the case. To make the contract usurious it must be apparent either upon the face of it, or by evidence, that the intention of the parties in the creation of it was by means of shift or device to take more than legal interest for the loan or forbearance of money. First, upon the merits this does not appear to be an unconscionable bargain; for from the answer 42*l.* appears to be a low rent. Then the question is, whether upon the terms of this contract we must necessarily take it as a \*contract in itself usurious upon the face of it. Upon farther consideration the agreement is, that on faith of the balance being paid at *Michaelmas* immediate possession should be given; and in that event the Defendants were to be considered as purchasers, and the estate was to be theirs; if not, then they were not to be admitted as purchasers, but to be considered as tenants, till it should be paid: therefore it was their business to accelerate the payment. In fairness that other part of the contract might take place, that they were only to be tenants, if the residue should not be paid at the time. Neither does it appear to me, that this in strictness can be considered as a debt from *Michaelmas*. At first I imagined, the Plaintiff had affirmed by his bill; but that, I think, is not founded; as he did not affirm the immediate sale, but the contract; and means by his bill to obtain performance; considering it only as *in fieri*, not so performed as to make the Defendants complete purchasers. To make them so the Plaintiff

tiff files this bill. I am pleased at finding out these reasons for supporting him; as in substance there is nothing unconscionable. At first I thought, it would have been necessary to have looked into the more modern cases: but I remember, it is laid down as a principle in them, that to make a contract usurious there must be something in it to shew, that it was in the mind of the parties, that there should be a forbearance for exorbitant interest. Here the Plaintiff does not seem to have intended, that the payment should be postponed, but anxious that the money should be paid immediately, not to give himself an usurious advantage, but to hasten the performance of the contract.

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To make a contract usurious, intention of forbearance for exorbitant interest must appear.

*Lord Commissioner WILSON.*

I am of the same opinion in not considering this as usurious. It seems to me, that it cannot be considered in that light, except as Mr. *Mansfield* took it up, that the whole bargain was completed, and nothing left between the parties except the payment of the balance at a future day; and then an agreement took place to pay for forbearance more than 5 per cent. If that was the case, it would undoubtedly be usurious: But that was not the substance of this agreement. The Plaintiff, proprietor of two houses, agrees to sell them. They were not then sold; for if so, there must have been a conveyance: but there was an agreement for that in the usual course, when the purchase-money should be paid. Then says the Plaintiff, "if you do not \* pay at *Michaelmas*, it being one of the terms of the agreement that immediate possession should be given, I will account at the rate of 5 per cent. in respect of the money paid, which is to be considered as lent to me, and you shall pay a rent of 42*l. per annum.*" It is as legal, as if he had said, he wanted the money at *Michaelmas*, and if it should not be paid, they should pay for these premises 300*l.* for it is a contract for the purchase of houses, not for forbearance of money.

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The decree was affirmed,



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cepted in the transaction of 1759, conveyed to the Plaintiff, and to impeach the purchase of an annuity from the Plaintiff by her brother as a breach of trust, and as obtained by fraud and for inadequate consideration, and also, in case the Plaintiff should succeed in her claim to the estates settled in 1757, that the Defendant should be compelled to elect to take under her husband's will or her dower upon those estates: but of these claims the two first were given up by the Plaintiff without argument, and the last by the Defendant; as *Saville Finch* under the settlement of 1757 had only an estate for life; and therefore the claim of his widow to dower upon the estates limited by it could not be supported.

Upon the other points the questions were, whether the Plaintiff was entitled to an additional sum of 20,000*l.* under the agreement of 1759, or whether it was not satisfied by the legacy given by her mother: secondly, whether she could then claim her interest under the settlement of 1757; and if so, whether she was entitled to any exoneration, and to what extent.

*Attorney General, Mr. Richards, and Mr. Sutton, for the Plaintiff.*

As to the claim of 20,000*l.* the release given applies only to the legacy given to the Plaintiff by her mother. This will be called a case of double portions. The rule as to that is now so settled, that it is too late to dispute it: but the single case to which it applies, is that of parent and child. It is laid down in *Goodfellow v. Burchet*, 2 *Vern.* 298, *Clark v. Sewell*, 3 *Atk.* 96; and has been acted upon in *Warren v. Warren*, 1 *Bro. C. C.* 305, and *Deveze v. Pontet*, *Finch's Pre. Ch.* 240, *n.* But this case does not resemble those. *Hartop v. Whitmore*, 1 *P. Will.* 681, was, as appears from Mr. Cox's note, very particular in its facts; and a receipt was given applying distinctly to the very thing given by the will. In *Copley v. Copley*, 1 *P. Will.* 147, the will was very particular; in terms applying to the very provisions made by the grand-father and father. *Jesson v. Jesson*, 2 *Vern.* 255, *Warren v. Warren*, *Ellison v. Cookson*, 2 *Bro. C. C.* 306 (57), and *Debeze v. Mann*, 2 *Bro. C. C.* 165, are all cases of that kind, where a  
 parent

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parent was bound or intended to make a provision by his will for a child. It is only a rule of evidence. The presumption is, that a parent does not intend to provide for one more than another, and that, as was lately observed here very wisely (58), not so much with a view to the benefit of the eldest son, but for the family at large. In *Bellasis v. Uthwatt*, 1 *Atk.* 426, it is said, that all must depend upon circumstances; and there being only one child, a double portion was there thought fit. In *Farnham v. Philips*, 2 *Atk.* 215, a residue given among children was not adeemed by portions given afterwards, because a residue is an uncertain thing. The rule is a sharp rule, and to be construed strictly, and not extended, according to Lord *Thurlow* in *Debeze v. Mann*, and *Grave v. Lord Salisbury*, 1 *Bro. C. C.* 425. *Elizabeth Finch* in this case made a bargain with her son, that he should pay this sum to his sister. He might have come to this Court, and have insisted upon having the estate on paying that sum. The mother might have levied a fine and suffered a recovery of the entailed estates, and so deprived him both of those and of the estates in fee-simple without this agreement: therefore that sum was the purchase-money for those estates. Suppose she had sold the estate to a stranger in consideration of 20,000*l.* and had afterwards given that sum to her daughter; that could not lessen the interest afterwards given by her will; and the accident, that the son is the purchaser, makes no difference. This sum is entirely independent of the will of the mother. Suppose she had made no will, the daughter would not have had any right to call upon her estate to make up that sum; for it was a sum coming *aliunde*, due to herself, and appointed by her for her daughter. As to her right to the life estate under the settlement, she executed the deed of 1769 under a mistake. That is plain from the recital, which is false; and the reservation of the equity of redemption to the brother is founded on that false recital, and therefore cannot bind the Plaintiff. She has also a right to have those estates exonerated; for the mother's intention was that her son should exonerate the *Yorkshire* estate including *Brimsworth* and *Rotherham*. Beyond dispute she has a right to have them cleared of all incumbrances except her proportion of the first mortgage. If two persons

join

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join in a mortgage of joint property, and the money is received by one, the other is only to be considered as a surety, and has a clear equity to have that estate discharged out of the assets of the principal, who received the money.

The Solicitor General, Mr. Mansfield, Mr. Mitford, and Mr. Campbell, for the Defendant (59).

Lord Commissioner EYRE.

This case was in the outset so involved and obscured by the parchment and transactions of a century, that even the very clear manner, in which it was stated by the *Attorney General*, hardly made it intelligible. But by the discussion it has undergone, it is reduced to two general questions; and those two lie in a narrow compass. The first question is upon the demand of a farther sum of 20,000*l.* as to which it is insisted by the Plaintiff, that she is not only entitled to that sum under the will of her mother, which she has received, but to a farther sum of 20,000*l.* under the agreement in 1759 between her mother and brother. The second question is, whether she is entitled now to insist upon her claim to *Brinsworth* and *Rotherham*, part of the *Yorkshire* estates, and to the other estates comprised in the settlement of 1757: if so, then there will be a subordinate question, whether she is entitled to any and what exoneration of them in respect of the mortgage, with which they are charged. As to the first, it seems to me to require very little more for the solution of that, than that the facts of the case should be understood. The facts, bearing upon this, are few. I shall take them up in 1759: when *Elizabeth Finch*, mother of the Plaintiff, who two years before had settled those estates upon her son for life, with remainder to his issue in tail, remainder to the Plaintiff for life, and having probably delivered up possession to her son, was disposed to give up to him the rest of her *Yorkshire* estates; and entered into an agreement with him to convey all the rest of those estates, of which she was possessed, and the family house at *Thryberg*, and to deliver up actual possession upon certain terms, not necessary to be stated, and upon an express stipulation,

(59) The reporter was prevented by indisposition from attending the arguments for the Defendant and the reply.

tion, that, when he should be in possession of the *Kentish* estates upon her death, (which imports, that it was understood, that he was then to come into possession of them without any conveyance from her) he should pay his sister 20,000*l.* There was a reservation by *Elizabeth Finch* of part of the *Yorkshire* estate, called *Bramley*, upon which nothing turns; nor does any thing turn on the subsequent agreement, regulating the manner and time of his taking possession. There was a conversation at the bar on the subject, and it was not perfectly agreed, whether the son was actually put into possession under these agreements or not. The language imports strongly, that he was. I do not know, that much turns upon it; otherwise it must have been particularly inquired into. Upon the agreements I must take it, that he might have been put into possession: but there is no reason to suppose any actual conveyance of them. Matters rested in this state till the death of *Elizabeth Finch*. By her will she gave all her estate in general words to her son, and 20,000*l.* to her daughter, with which she charged all the estates devised to the son; that has been paid; and the Plaintiff executed a release of that sum to him, taking no notice then of any claim she might have to another such sum; and perhaps not apprised of the existence of the agreement, upon which that claim rests. It does not appear, when the Plaintiff was informed of the existence of it; without which the argument upon her acquiescence in the receipt of one sum only fails. To consider it in the most favourable manner for the Plaintiff I will suppose her claim made soon after the death of her mother. A weighty observation was made by Mr. *Mansfield* upon the effect of the agreement of 1759: the Plaintiff was neither a party nor privy to it: her mother might at any time have released it, and perhaps have prevented it from ever taking effect by suffering a recovery of the *Kentish* estates, and otherwise disposing of them. If she could, and had disposed of them in another channel, the condition of giving that sum to her daughter would not have been performed. During the life of her mother the Plaintiff certainly had no means of claiming any benefit under this agreement, nor did any thing vest in her. She could have no means of enforcing payment, till the condition was performed. It is extremely questionable, how

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far the daughter as against the son, a party to the agreement and executor of the other party, being herself a stranger, could even in equity compel payment to her even after the death of the mother; and it is difficult to say, from what fund it would have been to be raised. If he could have been compelled in equity, it would have been, because it was intended as a provision for the daughter, and an only provision; from which it * might have been reasonable to presume, that the mother, having done nothing to alter or release the agreement, had in fact given her daughter that sum. Possibly that would have raised a trust in equity upon the estate and possession of the son. But there being an express devise to the daughter of 20,000*l.* for and in name of a portion, fortune, and advancement (the words of the will), that seems to me to destroy every pretence and argument in equity for raising any sum under the agreement; and the sum and the object, being precisely the same, that is by way of fortune and advancement to the daughter, afford a strong ground of positive intent, that the daughter should take no benefit under the agreement. It was observed by Lord Commissioner *Wilson*, that the will, though it contains no express reference to the agreement, yet in fact, giving the same sum for the same purpose, was to be considered *pro tanto* as an execution of the agreement: if so, these sums are one and the same 20,000*l.*; which goes to the root of this claim, and destroys it.

Upon the second question, under the settlement of 1757, though voluntary, the Plaintiff is *prima facie* entitled. The reservation of the equity of redemption to her in the mortgage deed of 1758 recognises this right; for there could be no other ground for that. Upon a first view I thought, it might admit a question, whether the Plaintiff, having accepted the 20,000*l.* under the will, could insist upon a life estate in these lands. This depends, not upon the question, whether the Plaintiff had waived her claim to these estates, but whether the mother took upon herself to make a disposition of the whole estate in these lands, and consequently to include her life estate, whether she meant that either by the agreement of 1759, or the will, or both, considering the will as

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an execution of the agreement: But upon farther consideration I do not see distinctly such a disposition in any of these instruments. Great stress was laid upon the exception in the second agreement of 1759 as evidence of an intent to convey those lands as well as the other parts, and to put all into the son's possession: but I doubt, whether it is not too much to conclude from such an exception so much; for an exception of this nature is easily accounted for in the particular case from the actual circumstances of the family, and by attributing it to caution, and perhaps anxiety, to prevent an agreement about the rents and profits of an estate, to be * delivered up to the son, from being extended to lands, which though part of the estate, were not comprised in the agreement, but stood upon a different title, and were probably in his possession long before the agreement. Therefore I incline to think her entitled to this life estate. But another difficulty is in the way of this, suggested by Mr. *Mitford*, which appears to deserve great consideration. This Plaintiff takes benefits under the will of her brother as well as her mother; an annuity of 200*l.* under his will, and another of 300*l.* under a codicil. If he has taken upon himself to make a disposition of those lands, the Plaintiff must elect. It is true, he has not devised them by name: but he has devised all his lands, and he was in possession of these. His true title to these, as it appears upon the conveyance, was as tenant for life under the settlement of 1757: but there is strong evidence, that both he and his sister considered him as having a fee simple, either as heir or devisee of his mother. The question then is, whether as between them his intent to devise these estates, together with what he was entitled to in fee simple as heir or devisee, is to be collected from the circumstances at the time. That they both considered him so entitled, is made out by this deduction; these lands were included in a mortgage to Lord *Middleton*, in which the Plaintiff joined; in an assignment to *Sitwell*, in which she also joined, there is a recital, that the mortgaged estates were devised to the son, or taken by him as heir at law, subject to the charges. Now when the brother and sister concurred in declaring, that these lands were part of the inheritance of the brother, and there was no trace of a recognition of the settlement of 1757, under which she claims the

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life estate, which settlement was originally voluntary, and had been broken in upon by the mortgage of 1758, and the sister's interest being probably supposed by both to be compensated, and well compensated, by the bequest of 20,000*l.* this train of circumstances, though not a legal or equitable bar of the life estate, and though the distressed condition of the Plaintiff as opposed to the affluent situation of *Judith Finch*, the widow of her brother, shews, it was not an ungracious claim, yet shews, the brother considered the estate as his, and consequently meant to pass it by his will; for he certainly meant to dispose of every thing, and this, if made out, will put her to her election in respect of her claim by his will. If she elects to take under the will, she must release the other claim; and the question of exoneration will not arise: if it is * to be made, our opinion is, that as to so much of the mortgage debt, as is founded upon Lord *Pollington's* claim, she is to have no exoneration; but that she is entitled to be exonerated from the subsequent mortgages. As to the rest of the bill, so much as charges fraud in the purchase of that annuity ought to be dismissed with costs: but as to the other parts, considering the situation of the family and her situation, I think, it ought to be dismissed without costs.

Lord Commissioner ASHHURST.

Neither question involves much difficulty. As to the first I am clearly of opinion, that the Plaintiff is entitled only to the sum of 20,000*l.* which she has received under the will. In questions of this kind I do not think, that cases are of much importance; for in no two are the circumstances precisely alike. They must depend upon the intention to be collected from the circumstances taken together. In the present case I think, there are very pregnant circumstances for inferring that intent of Mrs. *Elizabeth Finch* to give her daughter only 20,000*l.* By the agreement of 1759 she agreed to give to her son all her *Yorkshire* estate; and made the condition, that he should pay his sister 20,000*l.* when he should be in possession of the *Kentish* estates: But this was never carried into execution, but rested in agreement. Instead therefore of doing it by conveyance she did it by will; by which she gave him all her *Yorkshire* estate, which she had before contracted

tracted to do by conveyance. The will was only the completion of it; in which, as there could be no covenant, she supercedes the necessity of that by insuring the payment of the same specific sum to her daughter. It is given to her upon the same account; only the agreement says, it is for her fortune and portion; the will, for her portion, fortune, and advancement. They differ so little, that the intention must be supposed the same in both; so it was only doing in another mode the same thing, as was meant by the agreement of 1759. The Plaintiff has given judgment herself as to the construction of the will; for never, till this bill was filed, was that claim insisted on.

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Upon the second question I am not clear, that it was not understood in the family, that this sum of 20,000*l.* was to be a compensation to the Plaintiff for all her claims: but I do not think it so clear, as that we can decide the question upon *that ground. The two subjects are not *ejusdem generis*; and a life estate upon failure of issue of her brother was no present provision. We have no settled principle to guide us in saying, her mother meant to deprive her of that provision in that event. But there is another ground. She must elect to give up the annuities under her brother's will and codicil, or her claim to these life estates. The recital in the mortgage of 1769, to which she was a party, that her brother was entitled to the equity of redemption of the whole, though perhaps not absolutely conclusive, shews the idea of the family; and it is plain, the son acted upon that idea, when he devised all his real estate to his wife. Therefore the Plaintiff ought to elect; and the rather, because by the deed of 1769 she confirmed her brother in that mistake, if it was a mistake. If she had asserted her claim, he might have suffered a recovery of the *Kentish* estates, and have given his wife as good a provision.

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Lord Commissioner WILSON.

The first question is, whether this Plaintiff in the year 1792 at the age of 64 is to have an additional sum of 20,000*l.* as a fortune or advancement in life, having eighteen years ago received the same sum for the same purpose. It is clear, her mother, from whom both were to arise, meant her only to have one.

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one. It was objected, that the first was a charge upon the *Yorkshire* estate, but that the 20,000*l.* under the will was a compensation for the fee-farm rents and estates in *Kent*, which still remained to be disposed of, the other being given to the son by the agreement. But that was not understood by the parties to be so; for in the mortgage this 20,000*l.* was recited as being a charge upon the *Yorkshire* estate, and as being charged by the will, and not the agreement; and it is doubtful, whether the Plaintiff knew of this by the agreement; so it must be admitted, that at that time there was but one sum of 20,000*l.* or that the Plaintiff did know of that agreement. Of course the argument, that by the will it was imposed upon the *Kentish* estates, is not maintainable. The argument, that the testatrix was giving this 20,000*l.* not to her daughter but her son, for that if she had not made this will her daughter would have been entitled to that sum under the agreement, proves too much; for that is the consequence in every case of satisfaction. But, not to take up time, all those transactions taken together were considered as giving her one sum as and for a portion. The mother \*agrees to give her son all that estate; and as a consideration for doing that her daughter is to have 20,000*l.*: but not having completed it, she gives him the legal estate in pursuance of her agreement, and takes care, that the daughter shall not be deprived of that sum, which she was to have. There is no pretence therefore for this claim of the two sums.

As to the other question, that rests upon the voluntary settlement of 1757. Under that without doubt, supposing it not disturbed, the Plaintiff would be entitled to an estate for life subject to the preceding estate for life in her brother, and a contingent estate tail to his children. The mortgage, as far as it respects the 16,372*l.* did not disturb that; for then these premises were subject to that mortgage. But what was made in addition to that so far rescinded that settlement. In 1758, when the first addition was made, and the mortgage was increased to 17,000*l.* there was no reason for *Saville* and *Mary* to join but the settlement of 1757. Therefore it is a recognition of the settlement; as but for that they had no title to those estates. Then if the settlement was carried into execution,

tion, the son was in possession of those two estates, part of the *Yorkshire* estate; and the general words in the agreement of 1759 "all the estate in *Yorkshire*, of which *Elizabeth Finch* is "now in possession," were to avoid a particular description, and to leave out those two estates. If so, this agreement still recognises that settlement; whence arises an argument, that at that time the Plaintiff was intended to have, not only the 20,000*l.* but also her chance of the life estates; which was then but small; as her brother was young, and might have children: but that settlement was considered as existing, and meant to continue. A doubt was raised from the agreement in the same year, in which there was an exception of *Brimsworth* and *Rotherham*; which seems to be under the idea, that they were part of the subject of the former agreement; for the intention of the latter was so far to carry the former into execution, as respected possession and receipt of the rents and profits of the estate; the effect then being to execute the former agreement, what was excepted would have followed the fate of the rest, if not for that exception. But the answer to that doubt is, that the person, drawing the instrument, was probably told, that the son was then in possession of that part; and therefore that exception might have crept in inaccurately; and the words "of " \* which *Elizabeth Finch* is now in possession," seem nugatory unless there was some part of the *Yorkshire* estate, of which she was not in possession. If so, there is nothing prior to the will to shew, they considered this settlement as at an end. Her will is in the largest words; "all my freehold lands, "tenements, messuages, tithes, and all my personal estate." There is nothing particular, shewing she imagined she had a power over the life estate of her daughter; nor till her death in 1767 was an act done shewing a change of intention; therefore there was no act done, which was not consistent with the settlement of 1757. Then came the mortgage in 1769; and without doubt the recital does import, that the whole of the estate subject to it then belonged to *Saville*; and that it was subject to no other charge than the mortgage, and that by *Elizabeth's* will. To that the Plaintiff was a party. With regard to that, if they collected from the premises, I have drawn, that the settlement of 1757 was at an end, they inferred

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To rectify mistakes is the peculiar province of the Court of Chancery.

ferred that from premises, that do not warrant it; for no circumstance prior to the transaction of 1769 had tended to annul that settlement: so, if from those preceding transactions they concluded, that the whole of these premises belonged to *Saville*, it was a mistake; and it is the peculiar province of this Court to rectify mistakes. It is too much from this recital to presume the loss of deeds conveying this estate and destroying the settlement. I should be inclined in such a family transaction, where the same person was employed for all parties, to suppose the idea was, that she should take only the sum of 20,000*l.*; but that they had not taken the legal steps to prevent her from taking the other interest also. After this they proceeded upon the mistake, if it was one; and she did not understand herself to have any demand upon the estate subject to the mortgage except the 20,000*l.*; for in 1772, when an addition was made to the mortgage, she was made a party in respect of that sum; in 1774 that sum was paid; and in 1775 another addition being made, she was not a party; as her charge was paid. I am inclined to think therefore, that that recital in the deed of 1769 was upon the idea, that what was done before had put an end to the settlement of 1757; but do not think it sufficient evidence, that it was in fact put an end to. If so, that estate still belongs to her. But as to what she takes under the will of her brother, it was understood by all the family, that these estates were his, subject only to the mortgage; and it is clear from *Noys v. Mordaunt*, 2 *Vern.* 581, \* *Streatfield v. Streatfield*, *Forr.* 176, and other cases, that where it is understood by all parties, that an estate belongs to *B.* which really belongs to *A.* and *B.* devises all his estate to *C.* but also gives something to *A.* it is a case of election. Therefore the Plaintiff in this case must elect (60).

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Costs given as to part, and refused as to part.

The bill was dismissed with costs as to that part imputing fraud to the purchase of the annuity from the Plaintiff; as to all the rest, except her claim under the question of election, without costs.

(60) Ante, *Blake v. Bunbury*, 514; and the notes in pages 523, 7.

BLOUNT *v.* BURROW (61).

**W**ALTER, a Defendant, being examined before the Master in order to charge him with the receipt of four *India* bonds, the property of the testator, swore as to that, that he had received them from the testator twelve days before his death with directions to keep them in case of his death. The Master refused to allow him these bonds; upon which he accepted.

Mr. Lloyd and Mr. Hall, for the exceptions.

This is a good *donatio mortis causâ*; *Snellgrove v. Baily*, 3 *Atk.* 214, *Hill v. Chapman*, 2 *Bro. C. C.* 612. The examination of the party is good evidence in his discharge. Where you examine a party to charge him, and there is also matter of discharge, you cannot read one without reading both: *Kirkpatrick v. Love*, *Amb.* 589 (62). The answer of a Defendant may be read against him: but then he may read the whole: 2 *Com. Dig.* 98. *Darston v. Lord Oxford*, 1 *Eq. Ca. Ab.* 10, as to books and writings.

Mr. Selwyn and Mr. Ainge, for the report.

This is not good as *donatio mortis causâ*; because it is not stated in the examination, that it was in the last illness, which is absolutely necessary. Besides on all the suspicious circumstances of the case the Court will not receive the examination of the Defendant as evidence to entitle himself to these bonds. He never stated his claim by answer; nor till examined upon interrogatories. To allow this would be to allow him to make evidence for himself. If he takes these bonds, there will not be enough for debts. I admit the case from *Eq. Ca. Ab.* which is a book of good authority, though that point is not mentioned in the report of that case, *Pre. Ch.* 188. But that only goes to the case of books and writings; which I admit, because there is not the danger, and the parties in that

(61) Lord Commissioner Wilson absent. wise not. See post, *Ridgeway v. Darwin*; *Thompson v. Lamb*,

(62) If in the same sentence and as one transaction; other- Vol. VII, 404, 587. *Robinson v. Scotney*, XIX, 582.

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July 18th.

4 *Bro. C. C.* 71.

Issue directed to try, whether there was *donatio mortis causâ*; as it did not appear to have been in the last illness.

Party discharged, as well as charged, by his own examination.

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that case lived at *Barbadoes*; and many of them were dead. The case in *Ambler* refers in the margin to *Talbot v. Rutledge* as being *ad idem*; but that case is directly contrary. It was on 17th *October*, 1747; and it was expressly decided, that the party's own evidence could not be admitted; and 2 *Vern.* 194, was referred to there.

*Lord Commissioner EYRE.*

The examination is evidence in discharge of the party, who is charged by it. The modern cases have gone far for that, and rightly.

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Upon the other question, the Court was of opinion, that the objection, that it was not stated to be in the last illness was fatal: but the Counsel for the exceptions saying, he apprehended, that according to the cases it was not necessary that should appear, and that it did not appear in *Hill v. Chapman*, an issue was directed to try, whether this was *donatio mortis causá* (63).

(63) *Pre. Ch.* 269, 300. 1 *P.* *Will.* 404, 441. 3 *P. Will.* 356. 351. In *Gardner v. Parker*, 2 *Ves.* 431. 2 *Bla. Com.* 514. 3 *Madd.* 184, the condition for restoration in case of recovery, not being expressed, was inferred. See more upon this subject, *Walter v. Hodge*, 2 *Swinst.* 92, and the notes. In *Tate v. Hilbert*, post, Vol. II, 111, and 4 *Bro. C. C.* 286, Lord *Loughborough*, C. gives the true definition of *donatio mortis causá*, and corrects the inaccuracy of *Swinburne's* definition. *Hurst v. Beach*, 5 *Madd.*

GRIEVES v. CASE (64).

1792.

July 19th.

4 Bro. C. C. 67.

2 Cox, 301.

**T**ESTATRIX, having endowed the chapel of *Fakenham*, directed by her will, that 600*l.* should be laid out in freehold lands, or copyhold with fine certain, as soon as could be after her decease; and until an eligible purchase could be made, that the said 600*l.* should be placed out at interest by her friend *Charles Case*, his executors, &c.; whom she appointed trustees for the purpose of receiving and placing out the same for the most interest he could safely get, until a purchase could be made, and for making such purchase; and upon trust and confidence, as soon as *Case*, his executors, &c. could meet with such freehold or copyhold lands, suitable for the purpose, to cause them to be conveyed to himself or themselves and the other trustees for *Fakenham* chapel and their heirs; and the said 600*l.* she gave upon trust, that the interest and produce thereof, until a purchase could be effected, and afterwards the rents and profits of the purchased premises, should be applied to pay several small annuities for life. All the residue of the said interest or rents, and also the parts given to the annuitants, as they respectively depart this life, she gave and directed to be paid in equal moieties, the one to her friend *Thomas Mendham*, of *Briston*, Teacher of the Gospel, for his natural life; the other to her friend *Samuel Easthaugh*, of *Fakenham*, Teacher of the Gospel, for his natural life; and after the decease of *Mendham* one equal third part of the said interest or rents to be paid to the preacher or teacher for the time being, who shall steadily officiate in the chapel of *Briston*, belonging to *Mendham*, where he now usually officiates; the other two-third parts to *Easthaugh* for his life; he and the said preacher exchanging upon Lord's day alternately, the one at *Fakenham*, the other at *Briston*: provided that *Mendham* and *Easthaugh* do not voluntarily withdraw from and refuse officiating, when able, at the said *Fakenham* chapel as usual; if they do, during such recess the share of him or them refusing to cease, and go to the preachers appointed in his or her room: and after the decease of *Mendham*

Bequest of money to be laid out in land for establishment of minister of a chapel void under the 9 Geo. II. c.36. and not supported by supposing a discretion in the trustees not to lay it out in land, the directions being imperative.

Where the general object of the devise is void, to support upon an intention of personal benefit the interest of a devisee, it must be totally separate from that object.

(64) Lord Commissioner *Wilson* absent.



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ham and *Easthaugh*, and the survivor of them the interest or rents to be paid for ever to the preachers for the time being, who shall be chosen by the trustees of *Fakenham* and the trustees or major part of the communicants of *Mendham's* chapel at *Briston*; two-thirds to the preacher at *Fakenham*, and one-third to the preacher at *Briston*. She farther desired, that *Easthaugh* should not continue a stated preacher in her said chapel, nor enjoy the benefit intended him by her will any longer than he continues to preach the gospel.

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The bill was filed by co-heiresses of the testatrix; and a decree, which had been made by Lord *Thurlow*, contained a declaration, that this devise was not to be considered as void, so far as it respected the immediate annuitants (65). Upon farther directions two questions were made; first, whether in order to support this charity it was not possible to consider the trustees as not bound to lay out the fund in land: secondly, if not, whether the interest of *Mendham* and *Easthaugh* could be maintained, * as being separate from the charitable trust, and intended as a personal bounty and favour to them.

Attorney General, for the charity, cited *Grimmett v. Grimmett*, *Amb.* 210, as an authority, that the charity might be supported by considering the trustees as not obliged to lay out the fund in land.

Mr. *Mitford*, and Mr. *Steele*, for *Mendham* and *Easthaugh*.

There are no such words in the statute 43 *Eliz.* as “*maintenance for a minister.*” In 1 *Eq. Ca. Ab.* 95, it is expressly said, that is not within the words of the statute, but that it has been said to be within the equity of it. The only ground, upon which this can be taken to be a charitable use within the statute, is, that it is a provision for the benefit of those, to whom the religion is to be administered, not for the particular clergymen; for giving a charity for finding a clergyman cannot be deemed a charitable use with regard to the person, any more than a gift to any other person can be charitable for the benefit of the person, to whom it is applied. Thus a gift to provide a surgeon for an hospital is not charitable with regard to

(65) 2 *Cox*, 301. The case, as it came before Lord *Thurlow*, is there stated.

to the surgeon, but with regard to the persons taken into the hospital to be taken care of. This is a personal favour to these persons accompanied with a certain condition with respect to one of them, which may be construed to tend to a charitable use. She expressly calls them her friends. The proviso, that they shall not voluntarily withdraw, &c. shews, she had a view to their personal benefit independent of their situation as preachers at these two chapels; for if they were disabled by illness, or removed on account of the displeasure of those, who had power to remove them, it would then be merely a personal gift to them; for they would be in receipt of the fund without having any thing to do with the charitable use. It is a condition subsequent; and the gift is absolute. In the case of *Sir Coventry Carey's* gift to *Mr. Poole Carey* the devise was good, and the condition bad. Here it is a personal benefit, as in *Doe v. Aldridge*, 4 Term Rep. B. R. 264, and *Barrington v. ———*, before Lord Bathurst. The condition, though not within the words of the statute, yet is void as within the equity of it: but it is only a devise to these persons clogged with a condition, which is void.

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Solicitor General, contra.

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Doe v. Aldridge was in the absence of two of the Judges; and from the manner, in which it was treated, is a case of but very little authority. Besides the preaching there was expressly not to commence till after the death of *Aldridge*. The phrase used there as to him is, that the testator expects, he will promote the work of God; and words of expectation, confidence, hope, &c. will not be sufficient to raise a trust, unless where the object is certain. This case is not like that. This is not a gift to these persons upon a condition, that after their death there shall be a perpetual charitable establishment: but the effect is a devise of rents and profits of real estate for the purpose of creating and perpetuating a charitable establishment; towards the creation and perpetuation of which a provision was made for these persons, not absolutely, but in consideration of their doing that very duty, which those, who should succeed them, were to do, and in the same character. They admit the intention to make a perpetual charitable establishment, which is void after their death; but say, that, while
that

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that charitable establishment continues in their lives, they take distinctly from it for their own personal benefit: that is much too nice a distinction.

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It was said at the bar, that when this cause was heard before the *Lord Chancellor*, he was of opinion, that *Mendham* and *Easthaugh* were to be considered as entitled to life estates, though the trust should not be maintainable. This was not denied with confidence by the *Solicitor General*; but rather avoided, by saying, the whole of the will was not then stated.

*Lord Commissioner EYRE.*

The question, made by the *Attorney General*, must be first noticed; whether this can be a good disposition to a charitable use in respect of its being possible to lay out the fund otherwise than in land. For that a case from *Ambler* was cited. The whole of that case rests upon a critical comparison of words. The words in that case were "such purchase as is to the satisfaction of the trustees." If the question could be rested upon the similarity or synonymy of the two cases, it would be a fair argument. But I think, without saying, whether I approve of that case or not, that this is substantially distinguishable; and upon the ground stated by Lord *Hardwicke* there; for he says, \*if it had been a disposition of money to be laid out in land, he should have been obliged to have said, it was within the statute. Now this is that very case. Therefore the case cited will not apply; and it stands upon so much nicety, that it is not proper to extend it to cases, in which every part of the circumstances of that case does not occur. This devise therefore is void within the statute.

The next consideration is, whether these two persons are to be considered as having an interest detached from the trust, so as to be separated from the trust, though that should be condemned. It is said to have been the opinion of the late *Lord Chancellor*, that they were to be considered as entitled to a life estate, notwithstanding the trust was not maintainable. That opinion is the only circumstance, that raises a doubt in my mind as to the true construction of the will. The case  
 from

from the *Term Reports* does not upon consideration bear upon this at all. But that opinion is a great authority, and deserves much consideration. Whether according to the observation of the *Solicitor General* every part of the will fell under the eye of Lord *Thurlow*, it is impossible for me to say. But the unfortunate circumstance is, that this opinion does not bind me; as the decree has not gone far enough to include that question; for though the language of it is, that that devise was not to be considered as void, so far as respects the immediate annuitants, I cannot comprehend these two persons under that description. The testatrix has determined, whom she meant by those words; for she comprehends expressly the persons, to whom the small annuities are given, as her annuitants; and there is nothing in the decree to authorize me to suppose, the *Lord Chancellor* meant to comprehend more under those words, than she did. Besides in propriety of language these two persons were not annuitants. The others, who had small sums given out of the whole, were strictly so; but not these two, who take the whole residue, or the rents and profits, if the fund is laid out in land. Therefore under this decree it is void as against them in that character. Then can they be so separated from the general trust, that this Court is bound to condemn, as that their interest can be maintained, though the interests of those, who come after them, cannot. It appears to me, that the object of the testatrix was to make a disposition to a charitable use: and though some arguments at the bar tended to shew the establishment of a minister not to be a provision for a charitable use, yet that argument upon the whole \* falls to the ground; as it is admitted, that in respect of the benefit, which the flock are to derive from the exhortations of the pastor, it is a charitable use. Here the general object was to make an establishment for the two chapels at *Briston* and *Fakenham*. The latter was her own, which she had founded; and which was apparently her first object. *Mendham*, it appears from the will, was the stated preacher at *Briston*; and *Easthaugh* was one of the stated preachers at *Fakenham*; but both, as appears by the will, were alternate preachers at *Fakenham*. Having a general object to provide for both chapels, and having apparently a great confidence in *Mendham*, and a reliance, that his chapel would be taken care of

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of without a special provision in his life, and having a view, that in all events *Fakenham* should be provided for, as it had been, by the alternate preaching of both, she begins with giving them an estate for life in these premises, with a condition annexed that they do not voluntarily withdraw, or refuse to do the duty, they were accustomed to do at *Fakenham*. After the death of *Mendham*, when another preacher, whom she did not know, was to be appointed to *Briston*, she then comes to her more general idea of an establishment for both chapels. When *Mendham* drops, she arranges it in this way; that *Easthaugh* shall then take two-thirds, and the preacher at *Briston* one-third: but she expressly here makes that provision part of the trust and general object of the charitable disposition; for she has annexed to that, that they are to preach alternately at *Fakenham*. I lay no stress upon that proviso, that if *Easthaugh* apostatizes, he is to have no part of her bounty, but to observe that it shews the consideration of her bounty to these two persons; and that consideration affords the true construction. It was argued with great force, that there was a personal bounty intended to them. I agree, there was; but it is equally apparent, that it flowed from a confidence in them in the character of ministers of these chapels, and not in any other way. Then it comes to the question, whether if a plain trust and disposition to a charitable use are manifested by the will, and intended throughout, but that disposition is also manifested with a certain degree of personal bounty and favour to particular objects, that will take the case out of the statute: but I am of opinion, that if the personal bounty cannot be totally separated from the general object, in respect of which they are to have that preference, it is not sufficient; and it is proved clearly by the admission of Mr. *Mitford*, that if there is a general disposition to a charitable use, and the testator appoints the first preacher to exercise that function, that would be a case within the statute. That establishes the principle, that mere personal favour, and confidence, and benefit too, manifested essentially by the preference made of one to the other, as the first object of her bounty, will not separate that favour from the trust. It was manifestly her intention to make a general provision for the two chapels; to suspend that as to one till the death of *Mendham*

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Mendham, and to continue it as to the other from the moment of her death and during his whole life; and consequently there is a charitable use subsisting from the moment of her death as to *Fakenham* chapel; and these persons have this bounty only in respect of that charitable disposition. Consequently their estate cannot be separated from the trust; and if that fails, this, which is a part of it, must fail also. Then as to *Doe v. Aldridge*: the comments, which have been made, save me the trouble of saying much upon it. But we need not quarrel with that case; for though we may collect circumstances enough to see, what the testator in all probability did mean, yet it is an answer, that, where he says, he expects the devisee will promote the service of God, in those general words, the trust, which would be raised by the word “*expect*,” would fail; as there is not sufficient to connect it with the other trust. If therefore there is a fair objection to connecting with the life estate the subsequent trust, that estate is not a disposition to a charitable use. Therefore that case does not apply to this; for there is no benefit here intended to these persons distinct from this, that they had officiated at these chapels, and were intended to do so. Therefore the whole of this disposition after the annuities will fall under the general objection of a disposition of money to be laid out in land for a charitable use.

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Lord Commissioner ASHHURST.

Upon the first question I am clearly of opinion, that the bequest is void in its nature. Those, who have argued in favour of it, have relied upon that case in *Ambler*, in which Lord *Hardwicke* did not think the devise absolutely void: but that was entirely founded upon the wording of it. It was not a gift of money absolutely to be laid out in land; and though Lord *Hardwicke* did consider the case with a view to its being in the power of the trustees to lay it out so, if they thought proper, * yet as it was not obligatory upon them, he thought, they would not in their discretion do an act, which would be nugatory; but would suffer it to remain in the funds, by which means it would not be within the act. As he went in that case on a criticism upon the words, we cannot do it in this case; for the direction is imperative on them to lay it out in land.

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The next question is, whether there is any thing to distinguish the case of these two persons. I think, there is not. It is true, the testatrix does appear to have had a particular predilection for them from her long knowledge of them. But what was her general intent? It was to appoint a perpetual chaplain in these two chapels; and this appointment of these two was only the inchoation of that charity. It is true, during their lives she makes a particular qualification as to the application of the fund respecting those two, which is not meant to extend to future preachers. They are to take in moieties this benefaction: but her intention was as much to tie them down to the exercise of their function in these chapels as those to come after. That is plain from the will; which makes it as much a charitable bequest with regard to them as to the others. As to the case in the *Term Reports*, we may give it its due merit; though perhaps it was not looked into as much, as it might have been. The foundation of that idea was, that it was nothing more than a bequest beneficial to the party without annexing to it a stipulation of preaching in the chapel; which made it a charitable bequest as to the future preachers. Here that stipulation is expressly annexed to these two interests; which distinguishes this case from that. Therefore I concur with Lord Commissioner *Eyre* (66).

(66) Post, *Blandford v. Thackerell*, Vol. II, 238. *Attorney General v. Whitchurch*, III, 141. *Corbyn v. French*, IV, 418. *Chapman v. Brown*, VI, 404. *Attorney General v. Parsons*, VIII, 186. *Attorney General v. Davies*, IX, 535. *Stepney*, X, 22, 534, 8. *Curtis v. Hutton*, XIV, 537. *Currie v. Pye*, XVII, 462. *Attorney General v. Hinxman*, 2 Jac. & Walk. 270. *Henshaw v. Atkinson*, *Johnson v. Swann*, 3 Madd. 306, 457. *Waite v. Webb*, 6 Madd. 71. *Kirkbank v. Hudson*, 7 Pri. 212.

CROSBIE v. MURRAY (67).

1792.

July 20th, 21st.

ON the 20th December, 1784, *Grainger Muir* entered into a bond, reciting, that having by his last will left and bequeathed to *John Hilliard* (his nephew) a certain sum; and it being the resolution and intention of the said *Grainger Muir* to make a competent provision and allowance for him the said *John Hilliard*, till the aforesaid legacy should and might be carried into effect by the actual payment thereof; the condition therefore was, that if *Grainger Muir* or any person in his name and by his order, &c. should pay, or cause to be paid, to *Hilliard* the yearly sum or annuity of 150*l.* from the date thereof for the life of the said *Grainger Muir*, “and thereafter and until the aforesaid legacy and bequest, “so directed and made in and by the last will and testament “of the said *Grainger Muir*, shall be actually paid to him “the said *John Hilliard*,” the obligation should be void.

Bond to pay an annuity till a legacy recited to have been bequeathed by the last will of obligor to obligee should be paid. By a previous will he had given a legacy; but that was revoked by a subsequent will, and a less legacy given payable six months after testator's death “over “and above “the annuity, “which I have “secured to “him for his “life.” The annuity and bond were assigned by the obligee as some provision for his mother “to “be received “by her during the life “of the obligor “as fully and “beneficially,

In this bond the amount of the legacy was not specified; but *Muir* had in fact by a will, made when he was in *India* a few days before the date of the bond, left *Hilliard* 10,000*l.* with remainder to his brothers and sisters equally, in case of his death before that of the testator. In 1785 that will was revoked by another, by which the testator gave *Hilliard* a legacy of 4000*l.* “over and above the annuity of 150*l.* which “I have secured to him for his life.” That legacy was directed to be paid within six months after the testator's decease. The will also contained another legacy to *Hilliard* of 1000*l.* directed to be paid as soon as conveniently could be after the testator's decease; and another of 50*l.* for a ring. In 1786 *Hilliard* reciting the bond, and that in consideration of filial duty, and in order to make some provision for his mother, he had agreed to assign to her the said bond and annuity, did accordingly assign to her, her executors, administrators, and assigns “the said annuity and bond, and all estate, right,

“title,

(67) Lord Commissioner *Wilson* absent.

“as it could have been by the obligee.” The bond and assignment were put into the possession of the testator, and continued so till his death. The legatee is entitled to the legacy with interest, if not paid at the time; and also to the annuity for his life in trust for his mother.

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“ title, interest, possession, property, claim, and demand  
 “ whatsoever of him the said *John Hilliard* in, to, or out of  
 “ the same, to hold, receive, and take the said annuity to  
 “ the said *Ann Hilliard*, her executors, &c. from the date  
 “ of the said indenture for and during the life of him the said  
 “ *Grainger Muir* as fully, amply, and beneficially to all in-  
 “ tents and purposes, as he the said *John Hilliard* might or  
 “ could have held the same, in case the said indenture had  
 “ not been made.”

This indenture was found among the papers of *Grainger Muir* at his death.

The Master reported, that the legacy of 1000*l.* was a satisfaction of a debt due by the testator to *Hilliard* upon a promisory note given in 1783 for 452*l.* 5*s.* to which an exception was taken. That exception was given up without argument; as the Counsel for the report agreed to consider the legacy as payable at the death of the testator under the words “ as soon as conveniently can be after my decease,” which, the *Solicitor General* said, would displace what he intended to say in support of the exception.

The Master also reported, that *Hilliard*, who had received the legacy of 4000*l.* with interest from six months after the death of the testator, was not entitled to the annuity from his death; which was excepted to.

*Solicitor General* and Mr. *Richards*, for the exception.

The Master has misunderstood these instruments. The testator has died partially intestate. The latter will does not propose a case of election.

Lord Commissioner EYRE.

It is very material, that this bond was in the possession of the testator himself for the benefit of *Hilliard's* mother. He considered himself as having in his possession a benefit for her, which he intended to continue.

Mr. *Mitford* and Mr. *Campbell*, for the Report.

It is impossible to say, the will has given this annuity to *Hilliard*. It is not given to him for life by implication. His claim can only be under the bond. If a testator gives an  
 estate

estate to his son after the death of his wife, who has no estate in the property, it is an implied intention, that the wife shall have it during her life. So if an estate is given to *B.* on failure of issue of the body of *A.*, *A.* has an implied estate tail. But where there is an instrument giving a certain interest, that destroys the implication in the will; and nothing passes by it. In *Maitland v. Primrose*, 11th February, 1791, the testatrix, reciting that her husband was entitled to the fund for life, gave it after his death. This was her mistake; for he had no such interest; and it was held, that he could not take by implication. It is not to be collected from the will, that the testator intended to extend the annuity beyond the operation, which the bond would have to give it to *Hilliard*. The introduction of the words "*for his life*" is only a description of the thing given, not an actual bequest; and being so, it cannot operate as a bequest. The question therefore can only arise upon the bond, which is voluntary. The recital does not mention the particular legacy. It is so far from being with a direct reference to the particular sum, that the testator's intent was not to disclose the disposition, he intended by his will for this nephew. All words in any instrument must be taken with regard to the subject. A will is always revocable; therefore when an instrument is executed with regard to a will, it must be with regard to that circumstance. The purpose, that operated upon his mind, was to make a provision by way of maintenance for *Hilliard*, till the legacy should be paid. There is nothing in this instrument binding him to leave a certain sum of money to *Hilliard*. Suppose he had left him no legacy, or had died intestate: that does not answer the case; as the annuity is in lieu of the legacy, whatsoever it is, till it is paid; and if he does not choose to take the interest of the 4000*l.* in lieu of the annuity, he must be put to his election.

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Lord Commissioner EYRE.

That would be a very difficult construction from the words "*over and above*." Though that will not operate as a devise of the thing, yet it is sufficient to prevent him from being put to his election (68). There never can be a case of election but Election never but upon presumed intent.

(68) Ante, *Blake v. Bunbury*, 514, and the notes, 523, 7.

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but upon a presumed intention of the testator; which is in this case manifestly the other way; namely, to give him the legacy of 4000*l.* over and above whatever he can claim in respect of the annuity.

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For the Report.

Suppose it had stood upon the original will; it is clear, he could not claim both the annuity and interest of the legacy till payment. Then, when the testator has altered the amount of the legacy, not having stipulated to give to any particular amount, the effect is, that here is a legacy, which, being by his last will, is what he intends for *Hilliard*; and is to be paid with interest, if he elects to take it: but he is not to have both interest and the annuity till payment; and having claimed, and been paid, the legacy with interest from the end of six months after the death of the testator, it is a vested legacy, to which the instrument intended to refer; and the annuity is no longer to be paid. The first will has been preserved; which is unusual; and, if it had been lost or destroyed, it would have been extraordinary to have admitted evidence of the legacy given at that time; and it would have been difficult to have ascertained the fact. The only thing, upon which *Hilliard* can lay any foundation, is the words in the recital of the bond "having by my last will left and bequeathed." That was inaccurate, because that could not be said during the testator's life. It would amount to a restriction upon himself not to revoke it; as if he did, it could not be his last will. It is mere description. He intended this simply, to provide for *Hilliard* by will; and to make a provision for him, till that could be carried into effect; and therefore made this voluntary bond to pay an annuity, till the legacy should be paid. The words "*over and above*," from which it is inferred, that the testator had made a different construction of this instrument in his own mind, are only recital; and it is dangerous to hold mere words of recital to give construction to an instrument merely voluntary. That is never done. Where it is by way of contract, it is different; for perhaps a recital may amount to an agreement to do the thing. But those words may receive some construction; there might be arrears, to which they may be applied. The circumstance, that the assignment was found
among

among the papers of the testator, is a strong proof, that *Hilliard* himself considered it in nature of an annuity during the life of the testator. The assignment of the bond is only for the life of the testator.

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Lord Commissioner EYRE.

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He proposed to make a complete assignment of the bond: but in doing it he assigns it for the life of the testator.

This question has been very technically and very ably argued by Mr. *Mitford* and Mr. *Campbell*, but against the plain expression of the instruments, and the manifest intention, as far as it can be collected from them, and a farther intent, appearing from collateral circumstances, if we can take notice of them. It is true, if a man gives another a provision to continue to be paid to him, until he receives a legacy by the will of the party giving that provision, he will be understood, if there is nothing to the contrary, to mean that, which is in law the last will and testament; and that is a satisfaction of the former provision; and, whether more or less, the party must be content with it. Generally speaking, the will of a man is, not that, which he made some years ago, and afterwards revoked, but that, which is subsisting at his death. On the other hand, though that is the general rule as to the general expression of a legacy by will, yet a man may by the instrument tie up a provision he makes, till a provision by his will shall be paid, so as to apply to a particular will at a particular time; and therefore if he revokes that will, and prevents it from taking effect, the other provision will subsist. There could be no question, if the dates of the instruments had been inserted in the bond securing this annuity. If so, I think, it could not have been argued, that a will of a subsequent date would have been a satisfaction. Upon the words of that bond, the fact being, that it was executed upon the 20th *December*, 1784, and the will upon the 15th of the same month, supposing he had put in the dates, would it be possible to make a doubt, that the annuity was only to be redeemed by making good the legacy given by that will? Though it was revoked, and came to nothing, it is sufficient as a description of the terms, upon which the bond was to be void or not; though the expression is not sufficiently technical, supposing the instrument turns out
not

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not to be the will. So it stands upon the mere bond; upon which I do not doubt; though I agree in the principle, that if a man speaks generally of a legacy by his will, a person under these circumstances could not insist upon the benefit of the former will; as that is not the will. But if he refers in the bond to an act, he had done, by \*whatever name he calls it, as in strictness it is not bequeathed, the will not taking effect till the death of the testator, yet it is a sufficient description to shew the intention. So it is upon the instruments; and all the technical argument has been applied to overturn the words, the testator has expressed by that, which is his will, in 1785; for there he intimates his intention, that *Hilliard* shall have the 4000*l.* over and above the annuity secured to him. The testator might see good reason to reduce his bounty simply; or to substitute an annuity as a provision more effectual than a sum of money; and then the annuity would continue, if my sense of the condition is right; and I think it would. The cases mentioned do not come up to this point. Where in a will there is a recital of a fact, which does not exist, the law cannot effect it; as the will does not purport to give effect to it; reciting it as existing by some other authority. But it is different here; and it is clear upon the language of the testator and the fact of the will made before, giving that legacy of 10,000*l.* now not to be paid, that this is a subsisting annuity. About a year after the second will was made, when *Hilliard* assigned the annuity *as some provision for his mother*, just before the testator's death, did he take it into his custody as the common friend of both upon the idea, that it was to determine the moment of his death? Could any thing be more illusory? Could he intend that? To consider it so would be to disappoint by subtle and technical rules, (which rules I certainly must admit, though I may question their application in this instance) the intention of the parties in all their instruments and all their transactions. It is plain, that the Master has mistaken this. It is a subsisting provision; and *Hilliard*, as trustee for his mother, may claim it out of the estate of the testator. The other point being given up, it is unnecessary to say any thing upon it.

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Lord Commissioner ASHHURST.

I confess, I have not made up my mind. As far as it strikes me upon the notes, I have taken, I think, it is a question of some doubt. It is plain, in the original constitution of this bond it was meant as nothing more than a temporary provision for *Hilliard*, till he should be entitled to the provision under the testator's will. The testator had made a provision for him by a former will made before the bond. Afterwards he changes his intention; and gives *Hilliard* a less provision by the second will \* than by the first; viz. only 4000*l.*; and then uses the words "*over and above the annuity of 150*l.**" It certainly is competent to a man to give a benefit by his will by implication, if such presumption clearly arises. But it may likewise be a question, whether as that annuity was meant to be a provision for him during the life of the testator, and there might be arrears at the time of his death, he might not mean by the words "*over and above the annuity*" over and above the arrears. I do not say decisively, that this will be my ultimate opinion; but I should wish to consider it; as I think it a case of some doubt.

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Devise may be by implication, if upon a clear presumption.

Lord Commissioner ASHHURST.

The doubt, I intimated in this case, was entirely occasioned by a mistake of the words, in which the bequest of the 4000*l.* in respect of the annuity is comprised. But since I have had an opportunity of looking into the papers, upon reading them my doubt is done away. I had conceived, that there was only a general reference to the annuity; if so, I should have thought, it might fairly have admitted argument, whether he meant to give any thing more than the arrears, which there might be at his death. But when I come to read these words, "*which I have secured to him for his life,*" that makes an end of the difficulty. As to the question of election, my opinion is, it never can arise; because election can only exist, where a person has a decided interest before, and something is left to him by will, which may be then perhaps held to be a compensation. But here there was no certain benefit before; but on the contrary the annuity was to determine on the death of *Muir*; and therefore *Hilliard* can only take this as a circumstantial gift, as it is to be collected from the whole of the will taken together,

July 21st.

Election can only exist, where a person has a decided interest, and something is left him by will.



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ther, that that benefit was intended to be given to him. If this only arises from implication, the same instrument, from which that implication arises, negatives the idea of the 4000*l*. being meant as a satisfaction of the annuity; for it is impossible, that it can be a satisfaction, when he expressly says, "*over and above the annuity.*" Therefore that implies so plain an intention, that he was to have that annuity, that it must be construed, that the testator meant, he should have it; and only put in through forgetfulness or misapprehension, that he had before secured it to him: but he plainly intended, he should have it; and only for that \* misapprehension he would have given it to him. Therefore I give up my doubt; which arose upon a misapprehension of the words of the will.

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The first exception was disallowed; the second was allowed.

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1792.

July 23d.

## GRAVES v. BAINBRIGGE (69).

Devise of  
lands to be  
sold in aid of  
personal es-  
tate "and after

" death of my

**T**HE only question is this cause arose upon the construction of a will, the material parts of which are stated in the judgment.

(69) Lord Commissioner *Wilson* absent.

" wife the estates not sold and the personal estate not applied to be subject  
" as after-mentioned: the rents and produce to be carried on in accumula-  
" tion of 3 *per cents.* as aforesaid during her life, and also for five years  
" after her death; and to be laid out in land: then if my son *M.* shall be  
" living, and any lawful issue of his body, and if my son *G.* shall be  
" living, and any lawful issue of his body, to them for life as tenants in  
" common, then to their issue in moieties; if only issue of one, to that  
" issue, if but one, to that one:" with power of settlement; " my wife to  
" receive such provision as aforesaid neat and clear, and the residue  
" only to be subject to the devise over to take place after her death; and  
" if both my said sons shall be dead without issue," then to his daughter  
for life; after her death to her son, his heirs, &c. and if she should have  
any other issue, to them, their heirs, &c. on failure of issue of his sons  
and grandson.

The devise over is attached to the single event of both sons being dead without issue at the death of the wife, or five years after at most; and one son being alive at that time, though without issue, it never took effect. But the son is not entitled to the estate absolutely on account of the contingent interest in his issue.

*Lord Commissioner EYRE* delivered the opinion of the Court.

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In this case the bill is brought by *George Graves*, the son of the testator; and the prayer of it is, that the suits, decrees, and other proceedings, may be revived; and that the Plaintiff may have the benefit thereof against the Defendants; or that they may shew cause to the contrary; that the real estates of the testator unsold may be sold pursuant to his will; and that the necessary directions may be given for that purpose; that all proper parties may join; and that the money to arise, and what is now in the hands of the Plaintiff arising from the sale of an estate in *Norfolk*, may be declared to belong to the Plaintiff, and may be paid to him, or laid out to be settled for the trusts of the will; and that the rights of the parties may be ascertained.

The object of the bill is to bring forward for discussion the claims of *Elisabeth* and *Matthew Bainbrigg*, the daughter and grandson of the testator, under this will; and upon the supposition, that they can support their claims, to have the trusts carried into execution as against them: but if the Court is of opinion, that they have no claims beyond their legacies, this bill will be only a bill of revivor. It is not easy to make sense of so much nonsense, as this man has collected together, and thought proper to call his will. I will state as much, as is necessary to be seen, in order to judge of the claims of *Elisabeth* \* and *Matthew Bainbrigg*. After directing in a puzzled way, that the estates, he had, should be sold for the purpose of defraying in aid of his personal estate the legacies, he had given by his will, and for no other purpose, not for that, which was argued, of selling detached estates in order to purchase one more compact, he says “ and after the death “ of my dear wife such of my estates, as are not sold in her “ life, and such of my personal estate as is not applied and “ disposed of for the purposes before mentioned, to be sub- “ ject as after mentioned: the rents and profits of the estate, “ and the produce of the personal, to be carried on during “ her life in accumulation of 3 *per cents.* as aforesaid, and “ also for five years after her death, (but not to prevent my “ son *George* from receiving 2000*l.* under the settlement upon “ the death of his mother) all which I desire may be laid out “ in the purchase of land.” The object therefore was, that the

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the residue after those expences and that accumulation should be laid out in land, and, together with what should not have been sold, should go in the way, he goes on to declare. “ Then my mind and will is, that if my son *Matthew* shall be “ living, and any issue of his body lawfully begotten, and if “ my son *George* shall be living, and any issue of his body “ lawfully begotten, to them for life as tenants in common, “ and after their death to their issue in moieties. And if “ there should be no issue of one of them, but only issue of “ one,” (strange words, but we can guess at his meaning) “ then to that issue only equally and share and share alike; “ if but one, to that one: with power to him or them when “ in possession to make any settlement upon any woman, he or “ they shall marry, upon receiving a suitable fortune, but “ not otherwise. My intent is, that my said wife shall re- “ ceive such provision as aforesaid neat and clear; and the “ residue only to be subject to such devise over to take place “ after her death. And it is my farther will, that if both my “ said sons shall be dead without issue, then I devise all the “ said estates, freehold, copyhold, and leasehold, and all “ my personal estate of what kind soever, remaining as afore- “ said, to *Elizabeth Bainbrigge* for life, to her sole use; and “ after her death to my grand son *Matthew Bainbrigge*, his “ heirs, executors, administrators and assigns; but to take “ the name of *Graves*, and the arms; and to stand in their “ places; and if he does not, then to my next of kin.” And if his daughter should have any other issue by that or any other husband, then \* upon failure of issue of his two sons and his grandson *Matthew* (to whom he had before given an estate in fee) to such issue equally, their heirs and assigns for ever.

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Upon this case the question is, whether the devise over to *Elizabeth* for life, with remainder to her son *Matthew* in fee, is or is not attached to one event only; viz. both the sons being dead without issue at the time of the death of the wife, or at the utmost at five years after the death of the wife. We are of opinion, that it is; and that event not having happened, this devise over never took effect. The disposition for the sons, whatever more was meant, was intended to refer to, and be governed by, their situation at the death of the wife, or five years after the death of the wife. The words are

“ and

“ and after the death of my dear wife, &c.” and then after a long parenthesis, “ if my son *Matthew* shall be living, and “ any issue of his body, &c. and if my son *George* shall be “ living, and any issue of his body, &c. and if both shall be “ dead without issue,” then over. It seems to us to be pursuing the same train of things. If one or both sons are living, and one or both have issue, he devises in one way; if both are dead without issue, then in another. If it is said, this disappoints the will, I answer, it would disappoint the will I should have made: but it is the will he intended; and it is no reasonable objection, that his intention is absurd. He seems to have had a gross indigested notion of a limitation to his daughter and her issue, if his sons should be dead without issue. But it was impossible for him to express it clearly; as he did not conceive it clearly. He gave to *Matthew Bainbrigg*e a fee simple in express words; certainly without knowing he had; because it is given over to the other issue of his daughter upon failure of issue, as upon failure of issue of his own sons, to whom he had given an estate for life only. It is in vain to attempt any practicable limitation upon this. We should make a will for the testator instead of construing his will by such an attempt. Upon the best construction his meaning was, that if the sons happen to be dead without issue at the time, then the daughter is to take. This has not happened; therefore our opinion is, that the daughter is excluded. Supposing it to be so, it does not occur to me, that we can declare the right to these estates to be in the son the Plaintiff; as there is no person to sustain that question; for there is a contingent interest \*in the issue of the son, which we cannot prejudice. The bill must be dismissed, so far as it seeks to have the Plaintiff’s claim to the whole ascertained. He has brought his bill against *Elizabeth* and *Matthew Bainbrigg*e only; and prays, that as against them he may be declared to have the entire right to the estate. We only think him absolutely entitled as against them; but we do not know, that his issue may not according to the course of the Court hold him to an estate for life only. How can that question be determined?

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Upon consultation at the bar the decree was made in the following form. It was declared, that *Elizabeth* and *Matthew Bainbrigg*e

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*Bainbrigge* were not entitled to take any thing in these estates in the events, which had happened: that the money, received by the Plaintiff, should be paid into the Bank in the name of the *Accountant General*, in trust in the cause, subject to farther order: that the estates unsold should be sold in pursuance of the will; and the produce paid into the Bank, &c. subject to farther order; and that the costs of all parties should come out of the fund; and the residue be laid out.

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and 23d.  
4 Bro. C. C. 80.

COOPER v. DENNE.  
DENNE v. COOPER (70).

Discretion in the Court to decree specific performance of an agreement for a purchase, or to leave it to law; therefore a purchaser will not be compelled to take a doubtful title.

UPON a bill for specific performance of an agreement to purchase an exception was taken to a report, that a good title could not be made to certain leasehold premises at *Teddington*. The objection to the title was, that the leases, which were made by *John Perkins*, tenant for life under an act of Parliament, empowering him to make leases upon certain terms, did not pursue the terms, required by the act. The Court was clearly of opinion upon the opening, without argument, that the leases were not within the terms prescribed. The question then was, how far these had been confirmed; as to which the facts were, that *John Perkins*, tenant for life, joined with *John David Perkins*, remainder-man in tail, in suffering a recovery; the uses of which were declared to be to *John Perkins* for life, remainder to trustees \* for 500 years, remainder in fee to *John David Perkins*; who sold his remainder in fee to *Matthew Peters* by auction; and the leases were recited in the deed upon the recovery, and in the particular and conveyance under the sale.

[ \* 566 ]

*Solicitor General*, for the exception.

These premises and the leases being recited in the deeds upon the recovery and in the printed particular upon the sale by auction, and the estate being described as subject to the leases, they were confirmed; and it was impossible for *Peters* to say, they were not good (71).

(70) Lord Commissioner *Wilson* absent.

(71) Post, *Taylor v. Stibbert*, Vol. II, 437. *Hall v. Smith*, XIV, 426. *Daniels v. Davison*, XVI, 249.

Mr. *Mansfield* and Mr. *Stanley*, for the Report.

All the cases of confirmation are, either where there is an express confirmation, as by deed, or where a man grants such an estate as necessarily implies the confirmation of another. without confirming which his grant would have no effect. In this recovery there was no intention so confirm these leases: but the purpose of it was to enable the tenant for life to raise under the term a sum of money for his younger children, and to enable the remainder-man to go to market with his interest: and where one consideration appears, it is impossible to imply another. In *Shapland v. Smith*, 1 Bro. C. C. 75, the *Lord Chancellor* said, he would not in a doubtful case oblige a purchaser to take a title.

For the exception.

That was a very doubtful case; and there was great difference of opinion upon it.

*Lord Commissioner EYRE.*

I must agree, that the principle in *Shapland v. Smith* is liable to objection. But on the other hand I think, it must always upon a bill for specific performance be in the discretion of the Court to decree it, or leave it to law; as it is a case, in which damages may be recovered. Where a title has considerable difficulties belonging to it, and there are no means of clearing them up, when we are called upon to decree a specific performance, we ought not to do it. If it was before me, the inclination of my mind is, that these leases were confirmed; as under all the circumstances the inclination of my opinion is, that the \* uses of the recovery were sufficiently indicated in that instrument to be to confirm them; and that the estates were to be taken subject to those leases. But there is another difficulty, which makes me now speak of it as only the inclination of my mind. I doubt, whether the continuance of leases after a recovery does not rather depend upon the operation of the statute of *Hen. VIII.* (72), than any thing done in the recovery or declaration of uses. If an estate in lease is made the subject of a recovery, the consequence is, though the recovery is silent as to any terms, created out of any part of that estate, yet by force of the statute they continue to be incumbrances

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Leases for  
years protect-  
ed by statute  
21 *Hen. VIII.*  
c. 15 from the  
operation of a  
recovery.



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branches upon the estate. If so, that furnishes an additional reason, why these parties should not be considered as having a particular view to affirm or disaffirm these leases. It strengthens the argument for the conclusion from those cases, in which the Court has said, that in a doubtful case they will not decree a specific performance. I rather think, that Lord *Thurlow* was really of opinion, that *Shapland v. Smith*, in which he agreed with Master *Hett* against my opinion, was not a doubtful case; but that those words of doubt were thrown out in order to lessen the fall of that opinion, which I gave. Where the Court sees, there is a cloud upon a title, it is too much to decree a specific performance.

Lord Commissioner ASHHURST.

I concur. When the Court is called upon to decree a specific performance, it must be upon the ground, that there is no sufficient reason for refusing it. The fair way is for those, who are to decide it in equity, to put themselves in the place of the party. If I was called upon to give my opinion upon the point of confirmation, I should rather say, I thought this in point of law a confirmation; as I think, the leases were specifically mentioned, and treated as existing and valid leases: and that may be considered as a confirmation of the leases; and a case, that was cited from *Moore*, does contain that doctrine: But the Court is not called upon to decide that. It is sufficient for them to decide it, if they think it a doubtful matter (73).

Upon the application of the *Solicitor General*, the exception was ordered to stand over; as if disallowed it would appear upon record, that a good title could not be made (74).

(73) *Marlow v. Smith*, 2 P. of Northumberland, 1 Jac. & Will. 198. Post, *Sheffield v. Walk.* 559. 2 Madd. 175. *Ray Lord Mulgrave*, Vol. II, 526. *v. Pung, Smith v. Death*, 5 Madd. 310, 371. *Cann v. Cann*, 1 Sim. V, 186, 647. *Vancouver v. Bliss*, & Stu. 284. *Eyton v. Dicken*, XI, 458. *Lowes v. Lush, Franklin v. Lord Brownlow*, XIV, 547, 4 Price, 303. *Hall v. Dene*, 1 Jac. 189. *Sug. Vend. & Pur.* 4th edit. 286, &c.

(74) A compromise took place: Mr. *Peters* consenting to confirm the leases. 4 Bro. C. C. 88.

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30. Testator after giving life interests in stock to each of his daughters, afterwards the principal among his grand-children, in pursuance of a power in articles of partnership appointed his executors to carry on the trade in his room, with power to dissolve, or nominate any other person; and gave them his share of the capital and all freehold and leasehold in trust to carry on the trade as long as they should think fit; and after expiration of partnership to sell the estates, and with the produce, and profits of the trade, and all the rest of his estate, form a fund to accumulate 12 years; then among the grand-children living: by codicil he substituted his partner,

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31. Testator devised his estate upon trust, that his mansion-house, park, garden, &c. pictures, plate, furniture, &c. (to go as heir-looms) should by the trustee be kept in hand, and in good order and repair, till all incumbrances paid; upon farther trust to permit testator's daughter to have, hold, occupy, use, and enjoy his said mansion-house, park, garden, &c. pictures, plate, furniture, &c. for life; upon farther trust to lay out from rents and profits all he should think necessary to keep the mansion-house, &c. in repair, then to pay the daughter an annuity of 600*l.* for life (for whom he also charged the estate with 10,000*l.*) and to apply the surplus in discharging the incumbrances, from which he excepted the mansion-house, &c.; he gave the trustee 200*l.* a year above all charges; and after charges paid limited the estate over; the daughter occupied the house till her death; afterwards the trustee lived in it: the daughter

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held to have had an equitable life estate in the house, &c. as excepted from the general devise to the trustee; who therefore upon account was not allowed for rates and taxes paid, and expence of the garden defrayed by him during her life: but allowed for them afterwards, because under this will necessary for him to occupy either himself or by a servant: allowed for necessary expence of procuring a thing to be done, which turned out to be reasonable, though he might have come to the Court to see, whether it was proper: not allowed for costs of a suit against the daughter voluntarily paid by him, even though she was entitled to them from the estate; nor for a park-keeper upon the trust estate, because used as his own servant. *Fontaine v. Pellet.* Page 337

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61. Bond to pay an annuity till a legacy recited to have been bequeathed by the last will of obligor to obligee should be paid: by a previous will he had given a legacy: but that was revoked by a subsequent will; and a less legacy given payable six months after testator's death, "over and above the annuity, which I have secured to him for his life:" the annuity and bond were assigned by the obligee "as some provision for his mother, to be received by her during the life of the obligor as fully and beneficially, as it could have been by the obligee:" the bond and assignment were put into the possession of the testator; and continued so till his death: the legatee is entitled to the legacy with interest, if not paid at the time; and also to the annuity for his life in trust for his mother. *Crosbie v. Murray.* 555
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"be subject as after mentioned; the
 "rents and produce to be carried
 "on in accumulation of 3 per cents.
 "as aforesaid during her life, and
 "also for five years after her death,
 "and to be laid out in land; then
 "if my son *M.* shall be living, and
 "any lawful issue of his body, and
 "if my son *G.* shall be living and
 "any lawful issue of his body, to
 "them for life as tenants in com-
 "mon, then to their issue in moie-
 "ties; if only issue of one, to that
 "issue; if but one, to that one;"
 with power of settlement; "my
 "wife to receive such provision as
 "aforesaid neat and clear, and the
 "residue only to be subject to the
 "devise over to take place after her
 "death; and if both my said sons
 "shall be dead without issue," then
 to his daughter for life; after her
 death to her son, his heirs, &c. and
 if she should have any other issue,
 to them, their heirs, &c. on failure
 of issue of his sons and grandson:
 the devise over is attached to the
 single event of both sons being dead
 without issue at the death of the
 wife, or five years after at most;
 and one son being alive at that time,
 though without issue, it never took
 effect: but the son is not entitled to
 the estate absolutely on account of
 the contingent interest in his issue.
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END OF THE FIRST VOLUME.

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